IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 112.

MARY E. H. GWIN AND MYRA F. TRUSTE,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANTS.

BOYD & ATFIELD,
JAMES T. BOYD,
GEORGE A. KING,
FRANKLIN A. GANKIN,
of Counsel.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellees,

vs.

VICENTE PERALTA and Others.
MARY E. H. GWIN and MIERS F. TRUETT,
Intervenors,
Appellants.

Brief on the Part of Appellants.

This is a direct appeal to this Court from an order of the District Court of the United States for the Northern District of California, denying a motion for the execution of the final decree of confirmation in a California Private Land case.

The motion was founded on the matters set up in a verified petition or affidavit of appellants.

Record, page 1, fol. 1.

This is the second appeal to this Court in this case. This Court settled the title to the land claimed, on the former appeal, at December Term of the year 1856. The present appeal is rendered necessary by the refusal of the District Court to obey the mandate of this Court then issued.

19 How. 343, 349.

The grant under which the claim of title was asserted in this case was a grant of the Rancho of San Antonio. It was made in 1820 by Sola, the last Spanish governor of California, to Luis Peralta.

It is one of the oldest land grants in California, and was accompanied with *livery of seisin*.

The case in which the decree of confirmation was entered originated in a petition to the Board of Land Commissioners created under the act of Congress of March 3d, 1851.

Luis Peralta was the owner and in possession of the rancho at the time when the treaty of Guadalupe Hidalgo was entered into, and died seised and possessed of the lands of said rancho

in the year 1851, leaving a will whereby he devised the same rancho to his four sons—Domingo, Vicente, Antonio, and Ygnacio.

January 21, 1852, the four sons presented to the board a petition for the confirmation of their claim to the rancho under the grant and devise.

Record, page 4, fol. 8.

This case is No. 4 of the Commission—No. 100 in the District Court.

Appendix to Hoffman's Reports.

The board made an order in August, 1852, permitting Antonio and Ygnacio on their application to each file a separate petition for a portion of the grant.

Record, page 5, fol. 11.

This order was based on a stipulation of certain attorneys; was inartificially drawn, and made no provision for a separate claim by Domingo or Vicente, and no separate claim was presented by them or either of them.

Domingo and Vicente rested their claims on the petition filed January 21, 1852, in case No. 4.

The United States took issue under it, denying the validity of the grant and claim, and asserting title in herself under the treaty in the lands claimed.

The board examined the title under the claim made in the petition and that asserted by the United States; and decided that the grant was valid and vested in Peralta a present and immediate interest, that the United States took no interest therein under the treaty, and that the lands passed to the four sons under the will of Peralta.

Record, page 6, fol. 12.

After the petition was passed upon by the board, the right of either party to institute a suit in the District Court for the determination of their respective claims became a vested right.

U. S. vs. Ritchie, 17 How. 533.
Le Roy vs. Wright, 4 Sawy. 533

This right was exercised by the United States, and resulted in a decree adversely to her.

Record, page 6, fol. 12.

The right of either party to appeal to this Court from the decree of the District Court was a vested right.

U. S. vs. Adams, 6 Wall. 107.
Thompson vs. Los Angeles, Oct. Term, 1900.

This right was exercised by the United States, and resulted in a decree against her, and in favor of the claimants.

Record, page 7, fol. 15.
Record, page 56, fol. 104.

This Court in its opinion held that the northern line of the grant ran along the *north* instead of the *south* side of the Cerritos, as held by the District Court; and sent its mandate to that Court to conform its decree to the opinion and execute it.

U. S. vs. Peralta, 19 How. 343, 349.

The District Court thereupon made its decree on November 30, 1859 (filed December 1, 1859), correcting the decree of 1855 as to the northern boundary, by running that course along the northern, instead of the southern base of the Cerritos.

Record, page 7, fol. 17, 18.

This decree was never appealed from, annulled, reversed, or set aside, and is still of force, and unexecuted.

This decree confirmed the claim of Vicente, Antonio, Ygnacio and Domingo Peralta, *as tenants in common*, to the whole of the rancho *as of the 21st day of January, 1852*, when their petition was presented to the board.

Beard vs. Federy, 3 Wall. 491.
U. S. vs. Peralta, 19 How. 344.

It only remained for the Executive Department to give effect to the results of their labors.

Congress had declared that this should be the end of the litigation; that the decree should be conclusive between the United States and claimants.

Mott v. Smith, 16 Cal. 533, 551.

Here is *res adjudicata* in its broadest sense, not only because it was the decree of this Court but because Congress had also given to it that definitive character by express enactment in section 15 of the act.

Lynch vs. Bernal, 9 Wall. 322.

Under the provisions of the act of 1851, nothing now re-

mained to be done but for the surveyor general to survey the grant, and for the land office to make a patent for it.

9 Stat. at Large, page 633, sec. 13.

No provision was made in the acts of 1851, 1860 or 1864 for *compulsory survey of private land claims.*

Frasher vs. O'Connor, 115 U. S. 107.

This omission embarrassed the Government in the disposition of the public domain, and occasioned great discontent in California.

It occurred, however, in 1866 to legislators, that *the United States had power to survey the public domain,* and the act of that year enabled her to outwit the dilatory grantees of Spain and Mexico.

14 Stat. at Large, sec. 8, p. 220.

The confirmees were allowed by that act a limited time after confirmation to have their claims surveyed. Failing in this the surveyor was required to cause the lines of the public surveys to be extended over the granted lands, *setting off in full satisfaction of the grant,* and according to the lines of the public surveys, the land confirmed.

No survey of this claim was requested by the confirmees or by the United States, and no survey of it was made prior to the passage of the act, nor within ten months after its passage.

Record, page 25, fol. 52.
Record, page 28, fol. 52g.
Record, page 29, fol. 52h.

See instructions which the learned Commissioner Wilson issued to the surveyor, upon the passage of this act.

No. 132. Instructions relative to private land claims.

Zabriskie's Land Laws, page 606.

In the year 1895, the surveyor general, under the authority conferred and duty devolved upon him by that act, "*caused the lines of the public surveys to be extended over*" the lands of the grant, *and set off in full satisfaction of the grant* and according to the lines of the public surveys, the quantity of land confirmed in the final decree, *and as nearly as could be done in accordance with the decree.*"

This is the act and these the instructions under which the plat of survey of 1895 had its origin. Under its provisions the public domain was surveyed to the exterior lines of the

grant, *and the private claimant was compelled, in consequence of his neglect to request a survey, to take what was left in satisfaction of his claim.*

The delay of the surveyor in proceeding under this act cannot be imputed to the claimants.

This survey was authorized by Congress. The plat of survey was approved and certified by the surveyor general; is the only survey of the grant ever made by him, included all the granted lands; *became final, without the approval of the Land Department;* and was accepted by the confirmees.

Frasher vs. O'Connor, 115 U. S. 117.
McCreery vs. Haskell, 119 U. S. 333.
Durand vs. Martin, 120 U. S. 369.

It is compulsory on the confirmees; *they can have no other land than was thus lawfully set off to them; and that land they are entitled to.*

Botiller vs. Dominguez, 130 U. S. 242.

The surveyor thereupon prepared *a plat of survey of the lands of the rancho,* approved and certified it, and delivered it to one of the intervenors; by whom it was *presented to the general land office,* with a duly certified copy of the decree of confirmation, with a demand that a patent be made to the confirmees. This demand was refused; has ever since been refused; and no patent has ever been made for the grant. The plat is now on file in the department.

Record, page 28, fol. 52g.

A photographic copy of said plat of survey is annexed hereto, marked Exhibit "A."

When the general land office asserted that the survey of 1895 was the *only survey of the grant which had ever been made or filed,* it necessarily followed that the land so surveyed was the land which was granted—and that the confirmees were entitled to patent therefor.

Record, page 28, fol. 52g.
Smith vs. Reynolds, 9 App. Cas. D. C. 287.

Examination of this plat of this survey will show that it was made in exact conformity with the decree.

Certain persons claiming under the confirmees were by order of the District Court admitted to intervene in this case for the protection of their interests, and thereupon a motion was made by Mrs. Mary E. H. Gwin, that the decree be executed.

Record, page 24, fol. 50½.
Record, page 35, fol. 64.

The motion was made upon a verified petition or affidavit setting forth the facts concerning the claim, and action of the federal tribunals to the entry of the decree; averring that the decree of 1859 was a final confirmation of the title of the claimants; her rights as their successor in interest; that it remained unexecuted, and prayed execution.

The motion was denied without prejudice.

Record, page 52, fol. 97.
Record, page 34, fol. 62.

The Court below held on this motion, and based its denial on the propositions that the decree of confirmation of 1855, as amended in 1859, *was not a final decree;* that subsequently to 1859 this decree had been reversed, and set aside by the District Court. That the District Court had substituted another and different decree for that decree, which it designates as the decree of 1871; and had executed the latter decree.

Record, page 43, fol. 80.

Thereafter the appellants filed a new petition or affidavit, and renewed on their behalf the said motion; in which petition was set forth specifically the facts concerning the title which had resulted in the decree of 1859; and also action of the Court had subsequently to the entry of that decree.

Record, page 1, fol. 1.

The record shows that all the proceedings had in the District Court subsequent to the decree of 1859 were had in excess of the jurisdiction of the Court.

This motion was also denied, and the denial was put upon the same grounds.

Record, page 34, fol. 62.

The present appeal was perfected from the order denying this motion.

Record, page 53, fol. 100.

The claim of title set up in the petition was founded on the grant, possession under it, and the devise. The claim asserted by the United States was title to the same property under the treaty with Mexico.

A cursory examination of the opinion of this Court, on the former appeal shows that the matters considered were the

validity of this grant, the claim or title made in the petition, and the fact of the delivery of juridical possession of the granted lands.

As to the validity of the grant, and the claim of title this Court held:

"That the claim presented in the petition filed in this case, for the place called San Antonio, is valid to the whole extent of its bounds."

On the question of seisin, it considered these matters, viz.: What are the exterior bounds of the land whereof livery was made? Was the northern boundary San Antonio Creek or the creek at the base of the Cerritos of San Antonio? Was the western boundary the bay of San Francisco? Was the eastern boundary the crest of the Sierra? Was the southern boundary San Leandro Creek? And this Court held that the boundaries were those described in the Report of Martinez, and crystalized in the decree of the District Court.

U. S. vs. Peralta, 27 Fed. Cases, 499.
U. S. vs. Peralta, 19 How. 343.
U. S. vs. Pico, 5 Wall. 536.

When this Court affirmed the decree of the Court below, there can be no uncertainty in respect of the matter affirmed; this Court would not assume jurisdiction to partition lands between citizens of the State or to affirm such action by the Court below. It affirmed the grant to Luis Peralta, and the claim asserted under it, *in the petition*, and did not consider or pass upon any supposed claim not presented in the petition before it.

The claim made in the petition even with the names of Antonio and Ygnacio stricken from it, was claim to the Rancho of San Antonio as a whole.

This is the decree which appellants contend has never been executed, and of which it is the object of this motion to obtain execution.

Had the District Court granted the motion of appellants, and directed the United States to obey the mandate of this Court, and had the United States appealed therefrom, what persuasive argument would have been urged to this Court by the Department of Justice to secure a reversal of the order?

Antonio Peralta had, on the 18th day of June, 1852, presented his petition to the board (No. 273) for a portion of the rancho, claiming sole title thereto under the grant and the devise; and on the same day Ygnacio Peralta presented his peti-

tion (No. 274) for another portion of the said rancho, asserting sole title thereto under said grant and said devise.

Record, page 27, fol. 52d, 52f.

The case of Antonio became No. 98 in the District Court and that of Ygnacio No. 99.

Appendix to Hoffman's Reports.

Proceedings in each of these cases were separate and were also distinct from the proceedings in Case No. 4 of the Land Commission (No. 100 in the District Court), *the case at bar.*

Thurn vs. U. S., Hoffman, 298.

The proceedings in cases 98 and 99 resulted in decrees in each case adversely to the United States and in favor of the respective petitioners, for a several portion of the grant.

Record, page 28, fol. 52f.

The question of real estate law presented in this case is one which addresses itself to the student in a law office on the threshhold of his studies. It is a question of *priority of title from priority of right.*

He is early confronted with the maxim, "Qui prior est tempore, potior est jure," and early learns its application.

We have shown that the contest under the pleadings in this case was, which of two conveyances passed the title to the Rancho of San Antonio.

The conveyance to Luis Peralta was made in 1820. The conveyance to the United States was made in 1848.

If title passed by the conveyance to Peralta, there was no title left in the Government of Mexico to feed her conveyance by the treaty.

The question which conveyance was operative to pass the title was presented by the pleadings in this case, and was directly adjudged by the decree of this Court.

That decree not only affirmed the validity of the grant, and of the claim of title under the grant, but determined that the United States acquired no title to the granted premises under the treaty.

This decree is the law of this case. By force of it, the United States and her privies were and are estopped from asserting title to the granted premises or any part thereof.

Not only was the question of title adjudicated by this Court, but the question of boundaries of the granted lands was also put in issue and determined by the same decree, and the estoppel extended to that matter also.

The District Court in its action under the mandate of this Court, chose to treat the question as an open one, and it is this error of that court, which has brought before this court for consideration what was determined on the former hearing.

It is now claimed on behalf of the United States that surveys by her ministerial officers under these several decrees have successfully mapped the grantee of Spain and his assigns out of their property. It is no longer a question of title, but what property passed under the grant. Whether it was the property described in the decree of this Court or only the property described in several patents made by ministerial officers of the United States in accordance with the erroneous views of the District Court, and their own erroneous views also, of the proper construction of the decree of this Court.

The act of 1851 contemplated but *one survey* of a California Land Grant, and *one patent* for the granted lands.

Fremont vs. U. S., 17 How. 542, 565.
U. S. vs. Covillaud, 1 Black, 341.
U. S. vs. Grimes, 2 Black, 610.
Pico vs. U. S., 5 Wall. 536.
Hayner vs. Stanly, 8 Sawy. 214, 220.

In section 13, provision is made for a contest *in the local courts, of the right to the patent.* Pending which contest the District Court might enjoin its issuance.

This right of contest was exclusive. It was not conferred on the parties. As to them the matter was *res adjudicata.* They had their day in court. Their rights had been determined. The United States was the defeated party. She had no interest in any such contest.

The federal tribunals were required to be satisfied in the first instance with the *prima facie* right asserted and shown by claimants.

The object of the contest was to ascertain who was the actual successor in interest of the grantee of Spain or Mexico, and entitled to the patent.

U. S. vs. Sanchez, 27 Fed. Cas. 946 (No. 16,217).

There was no such contest in this case, no injunction, no bar to the issuance of the patent provided for in the act, as the sequence to the action of the Courts upon the claim presented and confirmed.

The rights of the respective parties under the act of 1851 were founded on contract.

Foster vs. Neilson, 2 Pet. 314
U. S. vs. Flint, 4 Sawy. 67.

Mexico ceded by treaty to the United States a vast territory for a valuable consideration.

The treaty provided that the inhabitants should enjoy with respect to their property "guarantees equally ample as if the same belonged to citizens of the United States," and be "maintained and protected in the free enjoyment of their liberty and property."

The Fossat Case, 2 Wall. 649, 703.

This act prescribed how the treaty should be executed, and when and upon what conditions the obligation of protection would be afforded, and it became a rule for the Courts.

U. S. vs. Flint, 4 Sawy. 48, 66.
Senator Crittenden, Cong. Globe, May 8, 1860, page 1961.
Altrazaran vs. Santa Rita, 148 U. S. 80.

The judiciary cannot depart from the method prescribed by Congress.

U. S. vs. Knight, 1 Black, 489.
U. S. vs. Nourse, 6 Pet. 470, 493.
Ely vs. U. S., 171 U. S. 223.
Bailey on Jurisdiction, sec. 22.

The act of 1851 was not merely a Code of Procedure. It was the method devised by Congress for performance of political obligations of the Government under the treaty.

It was an offer by the United States to each grantee under Spain or Mexico that if he would present his claim to the tribunals named in the act within the time limited, and prosecute the same successfully, he should *thereby* secure to himself the protection guaranteed by the treaty, and *forever* preserve his property rights.

The claimants did not come into court in this case voluntarily. They were forced to come under pain of forfeiture of their property.

9 U. S. Stat. at Large, sec. 8, 13.
U. S. vs. Flint, 4 Sawy. 50, 66.
Botiller vs. Dominguez, 130 U. S. 242.

The petition filed in this case was an acceptance by the petitioners of the offer so made; the rights of the parties were thereby fixed, and the act thereafter constituted a contract between the petitioners and the United States, which neither could change without the consent of the other.

Hancock vs. Walsh, 3 Woods, 351.
Reichart vs. Felps, 6 Wall. 165.
U. S. vs. Circuit Judges, 3 Id. 681.
U. S. vs. Flint, 4 Sawy. 66, 70.
Chicago vs. U. S., 104 U. S. 680, 685.

When the United States forced the claimants into the attitude of litigants with her, she abandoned her character of sovereign, and assumed the status of a *private litigant.*

U. S. vs. Aredondo, 6 Pet. 711.
U. S. vs. Flint, 4 Sawy. 58.
U. S. vs. Hancock, 12 Sawy. 394.

There is no reservation in the act of a right to submit these matters to any tribunal other than those named; or in any form except as therein prescribed, and no rule laid down in the act for the guidance of any other tribunal, in their determination.

U. S. vs. Hancock, 12 Sawy. 381, 394.

The jurisdiction of this Court did not exist in these cases by reason of its relation to the District Court, as a superior tribunal. Congress might have acted directly on the claims or have made the action of the board or of the District Court final; but jurisdiction to pass upon those titles, and the questions arising thereon, was expressly *created* and conferred upon the District Court and this Court in the manner prescribed in the act of Congress.

Grisar vs. McDowell, 6 Wall. 379.

The act was no less a contract because of its being an offer and acceptance, than if its provisions had been incorporated in the treaty.

Mexico might have insisted that each and all of the provisions of the act should be so incorporated, but she placed her reliance upon the plighted faith of the United States.

The Fossat Case, 2 Wall. 703.

The question submitted to the commission and the Courts by the act of 1851 was not within the ordinary cognizance of a court of law or a court of equity.

U. S. vs. Flint, 4 Sawy. 46.

Mr. Justice Field, commenting on this act, says, in the Flint case at page 50:

"We have principles prescribed for the Government of both

commission and Court in these cases, *and of the Supreme Court upon appeal from their decisions, not* applicable in ordinary proceedings, either at law or in equity."

Judge Hoffman said at page 67:

"Such were the means adopted by the political department of the Government to enable it to discharge its treaty obligations with intelligence and justice. It in effect called to its assistance the courts *and for that purpose invested them with a jurisdiction in all respects special and extraordinary, and which, except for the act, they would not have possessed.*"

He adds: "The ordinary Courts must be without jurisdiction when the political power has confided the whole subject to *special tribunals,* whose final decrees it has declared shall be conclusive."

This Court said in 21 Howard, 450: "In the exercise of the jurisdiction conferred by this act, and acts of a similar character, this Court has habitually revised decrees of the District Court, which were not final decrees under the Judiciary Act of 1789. The Court has uniformly accepted in the first instance, *as a final decree,* one that ascertained the authenticity of the claimant's title, and declared in general terms its operation, leaving the question of boundary and location to be settled subsequently. * * * The peculiar nature of these cases rendered such a relaxation of the rules of proceeding of this Court appropriate. The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their Executive Government to comply with that obligation. There was no occasion for the strict rules of proceeding that experience has suggested to secure a speedy and exact administration between suitors of a different character."

U. S. vs. Rico, 27 Fed. Cas. 806, 807.

The object of the act of 1851 could not be attained by simply declaring a title to be valid.

The confirmee was to be invested with the indicia of ownership and possession of his property, and to this end it was necessary that the boundaries of the property granted should be accurately determined. That was expressly provided for in the act.

It was so held in U. S. vs. Fossatt, 21 How., at page 451.

See, also:

Wayman vs. Southard, 10 Wheat. 4.
Stewart vs. Solomon, 97 U. S. 362.

Humphrey vs. Baker, 103 Id. 736.
Gordon vs. U. S., 117 Id. 702.
Re Sanford Fork & Tool Co., 160 Id. 255.
Central Nat. Bank vs. Stevens, 169 Id. 464.
Thompson vs. Los Angeles, Oct. Term, 1900.

In discussing the questions presented, it must be borne in mind that in dealing with a *confirmed claim* Congress and the Courts are not dealing with property of the United States, but with private property of the citizen.

Calder vs. Bull, 3 Dall. 386, 394.
Thurn vs. U. S., Hoffman, 298.
U. S. vs. Conway, 175 U. S. 69.

Congress may prescribe rules and regulations for the disposition of the public domain.

Irvine vs. Marshall, 20 How. 558.

With respect to the right of the citizen to property, its legislation may provide the means, under the treaty, for their ascertainment and settlement between him and the United States; but beyond that, it cannot go. When the right is determined, that right becomes personal to the citizen of the State; antedates the treaty; and the judgment of the Court brings it within the protecting aegis of the Constitution of the United States and of the State of California.

Hornsby vs. U. S., 10 Wall. 241.

Federal legislation and the federal judiciary have no concern with private property after it has been determined by the means prescribed, to be private property. Hence, rules and regulations concerning the *public domain* can have no application to the property of the citizen. Federal power cannot *regulate* him out of it.

Andrews Amer. Law, sec. 127.
Martin vs. U. S., Hoff., 146.
Cal. Powder Works vs. Davis, 151 U. S. 390, 394.
Potter vs. Randolph, 58 Pac. Rep. 905.

There is no proceeding under Mexican laws whereby the title granted to Luis Peralta could be divested, except by denouncement and judgment of forfeiture.

Fremont vs. U. S., 17 How. 542, 557, 560.
U. S. vs. Vaca, 18 How. 556.
U. S. vs. Sutter, 21 Id. 178.
Hornsby vs. U. S., 10 Wall. 238.

There is no proceeding under the constitution and laws of California whereby the title vested in Luis Peralta, and his assigns could be divested except by their voluntary conveyance, by succession or by condemnation under the law of eminent domain.

There is no provision in the Act of 1851 for forfeiture of the title vested in Luis Peralta at the date of the treaty, except for failure to present the claim of title to the federal tribunals.

U. S. vs. Sutter, 21 How. 170, 178.
U. S. vs. Flint, 4 Sawy. 69.
The La Ninfa, 75 Fed. 518.

When this Court has examined the title to real property; has adjudged the asserted claim of title under a grant from Spain or Mexico to be valid; and that it was made before the deed of Mexico to the United States; the validity of the grant and of the claim of title is no longer open to question. The decree has become the law of the case.

From assaults upon it by the Court below, or by the Department of Justice, this judgment needs no protection at the hands of counsel for appellants.

The matters left open for discussion, are, Has the decree been executed? Has the matter relied upon as execution of the decree really executed it? Has the confirmee received the fruits of his judgment?

Fremont vs. U. S., 17 How. 557.
U. S. vs. Conway, 175 U. S. 69.

The denial of this motion and the reasons given therefor by the District Court naturally suggest that something done by that tribunal subsequently to the entry of the decree has either executed the decree or furnished it reason for refusing to execute it.

We will now proceed to consider what was done by the Court below; whether it had jurisdiction to do what was done; and what was the effect of its action upon the rights of the appellants.

The learned Judge of the Southern District of California presided over the District Court of the Northern District in 1855 in the absence from the State of the Hon. Ogden Hoffman, Judge of the Northern District.

Judge Ogier did not perceive that the Court had reached the limits of federal jurisdiction in affirming the validity and extent of the claim made and of the right asserted in the petition.

99 Fed. Rep. 624.
Castro vs. Hendricks, 23 How. 441.
Grisar vs. McDowell, 6 Wall. 379.
U. S. vs. Halleck, 1 Id. 455.
U. S. vs. Fossat, 20 How. 424.
U. S. vs. Grimes, 2 Black, 610.

He assumed jurisdiction to turn the case made in a suit to settle title into a suit *for partition of the rancho*, between some of the claimants; thus inventing an issue not presented by the pleadings.

The District Court proceeded by its said decree to ascertain and determine *that on the 26th of January, 1855*, Domingo and Vicente Peralta and their assigns, had become the owners together in severalty to the exclusion of Antonio and Ygnacio, of the whole of the northern portion of the grant; specifically describing such portion as it is described in 19 Howard, page 344.

Record, page 7, fol. 14.

All the proceedings had by the District Court *in this case*, as shown by the records, subsequent to the entry of the decree of November 30, 1859, were had in relation to alleged surveys of the said northern *portion* of the grant *only*.

Did the District Court have jurisdiction to pronounce this portion of the decree?

There was nothing in the petition or the proceedings for confirmation looking to a *partition* of the rancho. There is nothing in the act of 1851 which would sustain any such action of the Court.

Putnam vs. U. S., 20 Fed. Cas. 90.
Philips vs. Mound City, 125 U. S. 610.
1 Bailey on Jurisdiction, sec. 22.
12 Encyclop. of Pleading and Practice, page 125.
U. S. vs. Grimes, 2 Black, 610.

No motion was made in the District Court to amend or change the petition in any respect, nor was it amended or changed. Nor was any separate petition filed by Domingo or Vicente.

Le Roy vs. Wright, 4 Sawy. 533.

The District Court thus sought by a further decree to *change the tenure of the claimants* as tenants in common, as it existed in January, 1852, in the whole rancho, into an estate in common in severalty of those two of them, in a portion of the grant, several years afterwards. This was attempted to be done long af-

ter Vicente, as shown by the record, had ceased to have any interest in the property to be affected by the decree.

Record, page 9, fol. 22.

As to any matter adjudged, except the validity of the claim, the decree spoke as of the date of its entry in 1855.

Lynch vs. Bernal, 9 Wall. 325.

These decrees are inconsistent. The tenure declared in the one, is different from that declared in the other.

Partition of lands in California held in private ownership is a matter which concerns the private owners; over which, and over whom, the Federal Courts had no jurisdiction.

Putnam vs. United States, 20 Fed. Cas. 90.
Green vs. Van Buskirk, 5 Wall. 312.
Brown vs. Brackett, 21 Wall. 387.
Martin vs. U. S., Hoffman, 146.

The establishment by the decree of 1859 of the *exterior boundary lines of the grant* built upon those lines a Chinese wall of exclusion, within which the federal Government could not enter, except for the purpose of locating those exterior lines.

Cooley Cons. Lim. (5th ed.), 30, 365, note 4.
U. S. vs. Grimes, 2 Black, 612.
U. S. vs. Morillo, 1 Wall. 709.
U. S. vs. Hancock, 133 U. S. 196.

The western boundary of the grant being the bay of San Francisco, neither the United States nor the State of California or her assigns, could assert title under the laws of California to lands, wet or dry, inside of that boundary, not derived from the grantee of Mexico.

Knight vs. United Land Association, 142 U. S. 186.
Tripp vs. Spring, Fed. Cas. No. 14,180 (5 Sawy. 211, 216.)
Cal. Powder Works vs. Davis, 151 U. S. 394.
Lowndes vs. Huntington, 153 Id. 22.
Carpentier vs. Montgomery, 13 Wall. 492, 493.
McFadden vs. Robinson, 22 Fed. 10.
Romie vs. Casanova, 91 U. S. 379.

Jurisdiction of the federal tribunals was limited to the ascertainment and determination of what Spain or Mexico had done with *her* lands. It could not determine what Luis Per-

alta had done with *his*. Of this subject and of the parties, the State judiciary alone had jurisdiction.

U. S. vs. Ritchie, 17 How. 541.
Castro vs. Hendricks, 23 Id. 442.

"The people of the State are supreme in their authority over all subjects of Government within the boundaries of the State, which are not delegated to the United States Government."

Andrews' American Law, sec. 158.
Wilcox vs. Jackson, 13 Pet. 498, 517.
Irvine vs. Marshall, 20 How. 569.

"The right and jurisdiction to determine finally all controversies between her citizens and all conflicting claims to property within her limits, is an essential element of sovereignty, which was possessed by each State before the adoption of the Federal Constitution, and this right was not surrendered by that compact."

The constitution and laws of California governed the acquisition, enjoyment, and disposition of property within her borders under the will of Luis Peralta, and determined the nature of the estate acquired by his devisees or heirs.

U. S. vs. Fox, 94 U. S. 320.
DeVaughn vs. Hutchinson, 165 U. S. 559.
Ely vs. United States, 171 U. S. 223, 239.
Brine vs. Insurance Co., 96 U. S. 636.
U. S. vs. Jonah Crosby, 2 Condensed Rep. 437 (7 Cranch).

Partition of lands by her own judiciary was provided for by law, by the State of California. Jurisdiction of the proceeding was conferred upon her own Courts.

Statutes of California, 1851, page 93.

No such partition, therefore, could be made of it without the presence, the assent or opportunity to be heard of all the parties interested in the land, and in a forum having jurisdiction both of the action and the parties.

Sutter vs. San Francisco, 36 Cal. 112.
Mulligan vs. Smith, 59 Id. 230.
Windsor vs. McVeigh, 93 U. S. 274.

Consent could not confer jurisdiction.

U. S. vs. Pico, 5 Wall. 539.
The Lucy, 8 Id. 309.
12 Encylop. of Pleading and Practice, p. 125.

The averments of the petition or affidavit on this motion were, that the decree of 1855 as amended in 1859 was a final decree of confirmation; that the validity of the grant and claim of title had thereby been affirmed by this Court; that the land had been surveyed by the United States; that the decree had not been executed; that ownership and possession of such land by definite boundaries had not been secured to the confirmees; and that this could only be done by patent in conformity with this decree.

These averments were admitted by the demurrer, but it was urged on behalf of the United States that some other decrees had been substituted for the said decree, and such other decrees executed; and that the District Court thereby lost all power to execute the original decree.

Whatever power the District Court may have lost, the power of this Court to compel obedience to its mandate does not admit of question.

Ex parte Union Steamboat Co., 178 U. S. 317.

It is true that its mandate is not self-executing. That it is addressed to the lower Court, and not to the Judge of that Court; and is transmitted to the Clerk to be filed.

No provision is made in it, or by law, for notice to the parties or to the Judge of the lower Court, of its existence.

The motion for execution in this case was notice to the Court below of the exigency of the mandate; of its duty to obey it; of its nonexecution, and of the right of appellants to demand execution.

The United States has no standing in court to resist the execution of the mandate of this Court. Her interest in the title ceased with the passing of the decree of 1859. She did not appeal from it. It became final by operation of law.

Martin vs. U. S., Hoffman 147.
Martin vs. Hunter, 1 Wheat. 304, 355.
U. S. vs. Fossat, 21 How. 449.

The gist of the whole matter is the command of this Court, and alleged disobedience by the Court below.

The form of proceeding by which the attention of this Court is called to the matter, would seem to involve nothing more than a question of practice.

Perkins vs. Fournequet, 14 How. 330.
City Nat. Bank vs. Hunter, 152 U. S. 515.
Ex parte Union Steamboat Co., 178 Id. 317.

There were no persons claiming adversely under Spain or Mexico by superior title, lands of the rancho. If there had been, they could not contest in the federal tribunals, the right of the confirmees to their patent. The patent that was to be made was a patent for the lands granted—the lands granted to Luis Peralta.

Any such adverse claimants would have to present their claims to the board in like manner, and with like results of affirmation or rejection, and get their independent patents. The State judiciary would have had jurisdiction over rights thus established, and of judicial contests respecting them, subject to supervision by this Court in cases where its jurisdiction could be invoked.

U. S. vs. Sanchez, 27 Fed. Cas. 948.
U. S. vs. White, 23 How. 253.
White vs. U. S., 1 Black, 502.
U. S. vs. Grimes, 2 Black, 612.
Thurn vs. U. S., Hoffman, 298.

The claim of title being determined, the ordinary courts of the country were then open to the patentees, to have adjudged which patentee had the better right to the lands.

Ibid.
McFadden vs. Robinson, 22 Fed. 10.
Cal. Powder Works vs. Davis, 151 U. S. 390, 394.
Crystal Springs vs. City of Los Angeles, 82 Fed. 114.

The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.

An execution is the end of the law. It gives the successful party the fruits of his judgment.

Wayman vs. Southard, 10 Wheat. 5.
U. S. vs. Peters, 5 Cranch, 141.
Gordon vs. U. S., 117 U. S. 702.
Ex parte Flippin, 94 U. S. 350.
U. S. vs. Black, 128 U. S. 48, 52.
Windom vs. Redfield, 19 D. C. 60, 137 U. S. 636.
Gaines vs. Rugg, 148 U. S. 228.
Central Nat. Bank vs. Stevens, 169 U. S. 464.
The Fossat Case, 2 Wall. 712.

The power of the District Court over the cause, under the acts of Congress, does not terminate *until the issue of a patent conformably to the decree.*

U. S. vs. Fossatt, 21 How. 450.

The learned District Court bases its contention that the decrees of 1871 are the final decrees in this case upon the proposition that the act of 1860 conferred power on that Court to reverse, annul, and set aside its decree, in considering a question of survey.

That this could be done at the instance of a stranger to the title and to the proceeding—in a new case and between new parties.

The decree had affirmed the validity of the grant and defined its boundaries as a part of the original adjudication. Hence the only persons interested in the surveys of the claim confirmed were the confirmees and the United States. But the surveys considered by the Court were not surveys of the claim. They were surveys of the farms of Vicente and Antonio *within the exterior boundaries of the grant;* which *grant* was owned, as its decree and the decree of this Court showed, wholly by *Peralta and his assigns.* The District Court, in acting upon this survey confronted by this decree necessarily held that *Carpentier et al. who did not claim under Peralta, were the owners of Peralta's land,* by title derived from the United States.

The decrees of 1871 are based upon this proposition.

But the act of 1860 had no application to *strangers to the title.* The interested party contemplated by the act is one "who has such an interest in the survey and location of a land claim, as to make it just and proper, that he should be allowed to intervene for his interest therein."

Dehon vs. Bernal, 3 Wall. 774.

The learned District Court erred in holding that the act of 1860 applied to the Peralta case.

If the act of 1851 was a contract; if the decree of this Court was determinative of the rights of the parties; how could Congress impose new and onerous conditions upon them, or either of them, by the act of 1860? How could Congress invest another tribunal with power to undo what had been done so many years before by this Court?

Reichart vs. Felps, 6 Wall. 160, 165.
U. S. vs. Flint, 4 Sawy. 42, 67, 70.

Congress could prescribe by the act of 1860 how the right reserved by Mexico and succeeded to by the United States of locating unlocated grants should be exercised.

The grant to Luis Peralta had been located by the former Government.

U. S. vs. Sepulveda, 1 Wall. 104, 108.

The learned Judge of the District Court, in deciding this motion, announced as the doctrine of this Court that the patent issued upon a purported survey under a final decree in a California private land case is conclusive of the rights of a confirmee, saying: *"The patents as issued in effect decide that the lands described therein include all the lands to which the claimants were entitled under the decree and survey."*

Record, page 45, fol. 82.

He cites the case of Beard vs. Federy, 3 Wall. 473, as authority for this doctrine.

Record, page 51, fol. 96.

With all due deference to the Court below, we do not think that the cited case bears out this proposition.

Beard vs. Federy was an action of ejectment. The demanded premises were included in the decree, in the survey, and in the patent. The defendants claimed under a grant from Governor Pico, which included portion of the patented lands. This grant had never been presented to the Board of Commissioners, and had never been *located* by Mexico or by the United States.

The question considered was whether the patent under which plaintiff claimed was conclusive of plaintiff's right to recover as against defendant's unconfirmed unlocated grant.

This Court held that the patent is record evidence of the action of the Government upon the *title of the claimant;* that as between the parties to the action "the Government declares *that the claim asserted was valid under the laws of Mexico;* that it was entitled to recognition and protection by the stipulations of the treaty; and might have been located under the former Government, and is correctly located now so as to embrace the premises as they are surveyed and described *As against the Government this record, so long as it remains unvacated, is conclusive.* And it is equally conclusive against parties claiming under the Government by *title subsequent.*"

The proposition laid down by this Court was that *in this form of action* the patent was not subject to collateral attack by an adverse claimant who did not claim under a superior title.

Lynch vs. Bernal, 9 Wall. 315; Carpentier vs. Montgomery, 13 Wall. 481; Henshaw vs. Bissell, 18 Wall. 255; Miller vs. Dale, 92 U. S. 457; Van Reynegom vs. Bolton, 95 U. S. 33; Adam vs. Norris, 103 U. S. 591; Knight vs. United Land Association, 142 U. S. 161; DeGuyer vs. Banning, 167 U. S. 723; Beley vs. Naphtaly, 169 U. S. 353, were also actions of ejectment, in which it was held as in the Beard case, that the patent which

included the demanded premises was conclusive as between the parties to the action of the right of the patentee to recover in that form of action; and that they could not so recover lands *not* included in the patent, without having it reformed in a proper proceeding.

In the KNIGHT CASE plaintiff claimed title to the demanded premises under an alleged grant from the State. Defendants claimed under a patent from the United States upon a confirmed Mexican grant.

Plaintiff had judgment in the local California Court, which, on appeal to the State Supreme Court, was affirmed; and was brought here by writ of error.

This Court held that the demanded premises were included in the decree of confirmation; that the survey followed the decree; that the patent which recited decree and survey was not subject to collateral attack. That it was conclusive in this form of action against all *persons* not claiming under a superior title derived from Spain or Mexico. That the State of California, claiming under the United States, had no title to lands embraced in the decree against her, and could not be source of title thereto in the plaintiff.

Mr. Justice Field, in a concurring opinion, shows at page 205 that the Court below "stated that the question involved was whether the officers of the Land Department had power to patent land outside of the natural boundaries given in the decree of Confirmation," adding:

"In this statement the learned Court fell into an error. No such question was involved in the case. The approved survey upon which the patent was issued crossed the mouth of Mission Creek, and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the possession of those lands the plaintiff could collaterally assail the correctness of the official survey upon which the patent was issued, and establish another line as the true boundary, and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any Court. If there was error in the survey embodied in the patent, it could not have been shown *in this action.*"

In discussing the Knight case, Mr. Justice Field says at page 212: "That the United States cannot convey by patent what it never owned, or has already parted with, no matter with what formality the instrument is issued; is a self evident proposition.

The Government in that respect is under the same limitations as an individual."

At page 209, the learned Justice quotes from Tripp vs. Spring, 5 Sawy. 215 (the defendant claimed title under the Pueblo grant; the plaintiff under the State of California).

In giving judgment for the defendant, he says:

"The decree confirming the claim of the city fixes the bay of San Francisco at ordinary high-water mark as its eastern boundary, and this line cannot be changed by the surveyor general or any department of Government. * * * Any patent of the United States which may hereafter be issued to the city from the land department can neither add to nor take from the title *already vested* in the city and those claiming under it."

By the act of 1851 Congress conferred upon the instrumentalities named jurisdiction to affirm or reject the claim of title to lands alleged to have been granted and located by Spain or Mexico, and if confirmed to convey the same to the grantees.

Higueras vs. U. S., 5 Wall. 827, 833.
Fremont vs. U. S., 17 How. 542, 565.
U. S. vs. Sepulveda, 1 Wall. 104, 107.
U. S. vs. Halleck, 1 Id. 439, 455.
U. S. vs. Billings, 2 Id. 444, 448.
U. S. vs. Armijo, 5 Id. 444, 449.
U. S. vs. Pico, 5 Id. 536, 539.
Alviso vs. U. S., 8 Id. 337.
Henshaw vs. Bissell, 18 Id. 255, 264.

The course of procedure was plain, simple, adequate, and symmetrical.

The board, aided by the Courts, was to ascertain and establish the boundaries of the *specific grant*, the surveyor was to plat the same, and the executive department to convey it by patent.

Where the former Government had not located the grant or claim, the board so aided was to determine its extent and the *out-boundaries*, and the executive, succeeding to the right of location which passed by the cession, was to locate and patent the claim.

Hornsby vs. U. S., 10 Wall. 224, 232.

If a patent is execution of a decree, which must control in the location of the property—the decree which ascertains and defines the boundaries, or the patent which is to interpret and give effect to the decree?

See the cases above cited.

In no case that has come under the observation of counsel has this Court held that a patent upon a private land claim which did not conform to the final decree of confirmation was conclusive upon the *confirmees*.

It remained for the District Court to discover that a ministerial officer, by a stroke of the pen, or the typewriter at his desk, could reverse the solemn decrees of that Court or perform the same kindly office for this Court. A power which neither of these Courts could exert after the passing of the term of entry.

We affirm that it is the doctrine of this Court that the decree of the Spanish or Mexican Government of juridical possession of the land estopped Spain and Mexico from claiming any interest in the granted premises before the cession, and that the same decrees and the decrees of the federal tribunals in like manner estopped the United States, after the cession.

U. S. vs. Sutherland, 19 How. 363, 365.
U. S. vs. Halleck, 1 Id. 439, 455.
Graham vs. U. S., 4 Id. 259.
U. S. vs. Pico, 5 Id. 536, 538.
Higueras vs. U. S., 5 Id. 827, 833, 834.
Van Reynegom vs. Bolton, 95 U. S. 33, 35.
Ainsa vs. U. S. 161 Id. 230.

The errors of the federal tribunals with which this case abounds, arose from failure to observe the distinction which exists in the character of grants of land in California, to which attention was called by Mr. Justice Clifford in Higueras' case, and subsequently by Mr. Justice Field. These grants were briefly classified by the latter learned Justice, in the cases of Alviso and Hornsby:

1st. Grants by specific boundaries where the donee was entitled to the entire tract. 2d. Grants by quantity, within larger out-boundaries, where the grantee was entitled only to the quantity specified; and 3d. Grants of a certain place or rancho, by some particular name either with or without specific boundaries where the donee was entitled to the tract according to the boundaries, if given, or if not given, according to the limits of the tract as shown by proof of settlement and possession.

The grant to Luis Peralta came within the first and third classes.

Higueras vs. U. S., 5 Wall. 833.
Alviso vs. U. S., 8 Id. 339.
Hornsby vs. U. S., 10 Id. 232.

Grants of the first and third class are defined to be *located* or *specific* grants.

Grants of the second class are denominated *floats*.

The rules of law applicable to a floating grant are inapplicable to the case of a *located grant*.

In both cases the *grant creates the title*. In the case of a *located grant* it creates title to the exact *thing granted*, and as of the date of the grant. The grantor had by his grant parted with the right and title to it absolutely, and invested the grantee with it. It was no longer property of the grantor.

Many grants in California of the former sovereignty were of a certain quantity of land to be carved out of a larger area. Mexico and her grantee thereby became *tenants in common* of the larger area with right of possession of the whole tract in her grantee; Mexico reserved the right to locate the float. Where this right had not been exercised prior to the cession, the United States succeeded to the Estate and the right. She anchored the float by survey, and located the grant by her patent.

Fremont vs. U. S., 17 How. 542, 557.
U. S. vs. Pacheco, 22 Id. 225.
U. S. vs. McLaughlin, 127 U. S. 428, 448.

Mr. Justice Clifford, in his dissenting opinion in the Fossat Case, said at page 726, where the grant is of a tract by specific boundaries: "It is incumbent upon the Court not only to determine the question of confirmation, but also, if it be decided to confirm the claim, to determine the boundaries of the grant as a part of the *original aljudication.*"

He calls attention to the distinction between specific grants and floats, saying: "In the case of a float, the location must be left to the Executive Department."

He says, also, that the provisions of the act of 1860 have nothing to do with the *decree* entered in 1858 nearly two years before the act was passed.

Appeals to this Court, in matters of survey of California land grants have been with but few exceptions, upon surveys of floating grants. These cases are reported in

Fremont vs. U. S., 17 How. 542.
U. S. vs. Fossat, 20 How. 413.
U. S. vs. Fossat, 21 Id. 445.
Rodriguez vs. U. S., 1 Wall. 582.
U. S. vs. Vallejo, Id. 658.
U. S. vs. Sutter, 2 Id. 562.
U. S. vs. Pacheco, 2 Id. 587.

The Fossat Case, 2 Id. 649.
Alviso vs. U. S., 8 Id. 337.
Hornsby vs. U. S., 10 Id. 224.

The bond which Shylock exacted of Antonio furnishes another instance of a floating grant.

"If you repay me not on such a day in such a place
Such sum or sums as are expressed in the condition;
Let the forfeit be nominated for an equal pound
Of your fair flesh to be cut off and taken
In what part of your body pleaseth me."

—Merchant of Venice.

But in this case the grant was to be located by the obligee, who, for reasons personal to himself, did not care to exercise the right.

The cases in which surveys of specific grants were considered are

U. S. vs. Halleck, 1 Wall. 439, 455.
U. S. vs. Estudillo, 1 Id. 710, 717.
U. S. vs. Billings, 2 Id. 444, 448.
Dehon vs. Bernal, 3 Id. 774.
Graham vs. U. S., 4 Id. 259.
Higueras vs. U. S., 5 Id. 827, 832, 833, 834, 838.
Knight vs. United Land Assn., 142 U. S. 161.

The case of U. S. vs. Hancock, 133 U. S. 193, was a suit to set aside a patent upon a specific grant for alleged fraud in the survey.

U. S. vs. Sepulveda, 1 Wall. 104, 108.

The District Court undertook in this case to revise a survey under a final decree of the board. This Court held that the Court had no jurisdiction over such surveys, saying "the act of 1860 creates a new jurisdiction in the Court which cannot be assumed independent of the act, and under it should be exercised only in cases coming clearly within its language."

The act of 1860 is limited to surveys made in compliance with the 13th Section of the act of 1851. Surveys of the grant.

12 Stat. at Large, p. 33.
U. S. vs. Rico, 27 Fed. Cas., p. 808.
U. S. vs. Armijo, 5 Wall. 444.

This was a case of apparently conflicting grants, where the patents made upon them did not conflict, and this Court held that the surveys were in accordance with the equitable rights of the patentees.

If the claim be to land with defined boundaries, or capable of identification, confirmation perfects the title to the particular tract, and a subsequent patent is only documentary *evidence of that title.* If the claim be to quantity, and not to a specific tract, confirmation will attach to the *land segregated by survey.*

U. S. vs. Sutherland, 19 How. 353.
Langdean vs. Hanes, 21 Wall. 521, 529.
Teschemacher vs. Thompson, 18 Cal. 11, 25.
Morrow vs. Whitney, 95 U. S. 551, 554.
Whitney vs. Morrow, 112 Id. 693.
Maxwell Land Grant Case, 121 Id. 325, 372.
See act of July 1, 1864, 13 Stat. at Large, sec. 7, page 334.

It was action of the District Court similar in The Fossat Case to that approved by the Court below in this case, which drew from Mr. Justice Nelson the indignant protest, at page 714 of the 2d Wallace.

Where survey is to be made of a tract of land with specific boundaries shown by natural monuments, the task of the surveyor is simple. He must fix the location of the monuments on the ground, and in platting must extend the lines between them. Courses and distances must both yield.

These monuments are unchangeable. They will always be found where nature placed them unless destroyed by some convulsion of nature.

Such are the monuments given in the decree in this case; their location was unmistakable. The duty of the surveyor was plain. He was powerless to change the monuments. No trick of survey could accomplish that. The grant was not *perfect,* because the location of the eastern boundary (the crest of the Sierra) was to be determined by survey on the ground; but when so ascertained the grant was a specific, located grant, in its entirety.

The Court declared in its decree, the location of all the lines, and the termini of the eastern line, so that it could be readily traced on the ground.

Carpentier vs. Montgomery, 13 Wall. 480, 490, 494.

This was the decree which was to be executed. This was the decree, of which survey was made in 1895.

It was the duty of the United States to survey and patent the confirmed claim. If it did not do so, if it surveyed and patented something else, it was the error of the United States; not of the patentee.

The Court had thus by the existence and potentiality of the

decree in favor of Domingo and Vicente enabled the Department to advise the United States that execution of this decree relieved it from obedience to the mandate of this Court.

We have endeavored to show to the Court that the object of the act of 1851 was to sever the private land claims from the public domain; that a decree which determined that certain land was granted and *located* by Spain or Mexico was final and conclusive between the United States and claimants; that the decree confirming the claim presented in the petition in this case for a *located grant* exhausted the jurisdiction conferred by the act, and is the law of the case, and left no question open but the location by survey on the ground, of the tract claimed and confirmed by the decree.

U. S. vs. Rico, 27 Fed. Cas. 807.

If we have not succeeded in convincing this Court that the only survey under the decree is the survey of 1895; that this survey has not been followed by patent; it becomes our duty to show that there has never been a survey or patent of the lands so assigned to Domingo and Vicente.

The decree in favor of Domingo and Vicente Peralta does not describe any portion as a grant or claim. It confirms to them the northern portion of the land of the rancho, referring to the grant lines for the exterior boundaries. To ascertain what land was intended to be conceded to them, the two decrees must be construed together, which will give us a description of the concession, as follows:

And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta, the northern portion of said land of San Antonio; having for its northern boundary a line commencing on the bay of San Francisco, at a point where there are close to the said bay the two cerritos as described in the first possession given by Martinez to Luis Peralta on the 16th of August, 1820; running from the said bay eastwardly along by the *(southern)* northern base of the cerritos of San Antonio up a ravine to the comb or crest of the Coast Range of mountains, or the Sierra; thence for the *(western)* eastern boundary, a line running along the comb of the said Sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco, and extending easterly to the said Sierra; on the south by the said line beginning at the crest or comb of the Sierra, and running westerly through a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in

sight of the public road; thence following the center line of the ravine and the creek or estuary of San Antonio to its mouth in the bay of San Francisco; being the line of division between this land and the land of Antonio Peralta; which line extends from the said bay to the most eastern boundary of the rancho of San Antonio, and on the west by the bay of San Francisco, which line along the bay constitutes its western boundary.

Or, the description of the portion so assigned to Domingo and Vicente Peralta might have been rendered thus:

The claim presented in the petition filed in this case, for the place called San Antonio is valid to the whole extent of its bounds, to wit:

Giving the external boundaries as they are set forth in the decree of 1855 as amended by the decree of 1859, adding:

And that there be confirmed to Domingo and Vicente Peralta the whole of the said rancho *excepting therefrom,* all that portion thereof which lies south of a line dividing the lands of Vicente from the lands of Antonio Peralta, which line is the line of division between this land and the land of Antonio Peralta, and which line extends from the bay of San Francisco to the comb or crest of the Sierra. This line of division between said Vicente and Antonio is further described as follows:

Commencing at a point in the western boundary of the rancho, where it is intersected by the northerly bank of San Antonio Creek, running thence southerly along the westerly line of the rancho to the middle of said creek; running thence in a general easterly direction following the thread or center line of the creek to the foot of a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, and thence following the said ravine easterly to the comb or crest of the Sierra.

Record, pages 27, 28, fol. 52 E.

These descriptions conform to those axiomatic propositions in applied mathematics:

I.

That the sum of all the parts of a thing is equal to the whole thereof.

II.

That where a tract of land is to be divided into two or more parts by right lines extending easterly from a westerly boundary, approximately parallel to each other, each parcel where there are two only, must have one coterminous boundary; where there are three parcels, two of them must have coterminous

boundaries with the third; where there are four parcels, two of them must each have coterminous boundaries with other two of them.

See Diagram, post, p. 46.

Having ascertained what the decree is, what is the land whereof confirmation was made to Domingo and Vicente Peralta, the question for consideration is whether this decree has been executed.

By referring to the record, it appears that in August, 1859, the United States, moved the District Court to order returned by the surveyor general a plat of survey of *part* of the Rancho of San Antonio, approved by him, in Case No. 4, and obtained an order to that effect; that a survey and plat of such portion of the grant was accordingly made, certified, and filed in Court.

Record, page 12, fol. 28.

That afterward the decree of the District Court having been amended as directed by the mandate of this Court, November 30, 1859, a further order was made remanding this plat with instructions to the Surveyor to conform it to the amended decree.

Record, page 15, fol. 34.

That on August 10, 1860, said surveyor returned into Court a new plat of survey of the said portion of the rancho which was approved by him March 3d, 1860; and this survey was considered by the Court.

Record, page 13, fol. 28.
Record, page 16, fol. 34.

H. W. Carpentier applied to the Court on behalf of himself and others for leave to contest, and was admitted to contest this survey under his alleged grant from the State of California.

Record, page 16, fol. 35.

They did not claim under Peralta, the owner of the property, but under the State. The State claimed title under the United States. This Court had determined the claim of the United States adversely. The United States was a stranger to the title.

The matter to be contested was the question of the location of the dividing line between the farms of Vicente and Antonio.

This was not a federal question. It was a matter of State judicial jurisdiction, in which those two were alone interested.

It was a matter of no more interest to the United States than

would be the location of the dividing lines between two lots in the city of Oakland or the city of New York.

Her tribunals could not locate or establish such a line.

There is probably no other man in the United States who ever stole a river, and who successfully concealed his crime and enjoyed the usufruct for nearly half a century. 1852-1901.

City of Oakland vs. Carpentier, 21 Cal. 642.
State of California vs. Southern Pac. Co., 157 U. S. 228.

In considering the survey the Court had no power to depart from the decree.

The decree of 1859 was the only guide to the surveyor and he must follow it in making the survey. The Court must be guided by the decree in passing upon the survey.

U. S. vs. Halleck, 1 Wall. 439, 455.
Supervisors vs. U. S., 4 Id. 435.
French vs. Edwards, 13 Id. 506.
Miller vs. Dale, 92 U. S. 477.
Gaines vs. Ruegg, 148 Id. 240.

The Court examined this survey and *rejected* it as not being in conformity with its decree.

See Exhibit "H."
Record, page 17, fol. 37.

The examination of the plat of this survey will show that it was made in exact conformity with the decree.

The District Court did not so construe its power. This is apparent from the language of its decree rejecting this survey which was entered November 22d, 1862, for while it directed the surveyor to adopt all the lines and courses numbered on the plat from 1 to 93 and 113 to 130, inclusive, he was directed to so modify the survey in a new survey as to conform it to the decree of November 22d, 1862, and to throw out from and discard all the lines and courses 93 to 113, inclusive (*which had been run in conformity with the decree of 1859*), and run all those lines and courses along the *inner line of the shore*, excluding therefrom and *from the lands confirmed* the waters of the bay of San Francisco and of *the arms thereof*, and the lands covered thereby, so far as the tides ordinarily flow at the full (and) change of the moon.

Record, page 17, fol. 37.

This change and modification of the survey as to the western and the southern lines of the said portion of the rancho was a

radical departure from those lines as they are described in the decree of 1859.

In giving direction for the new survey, the Court directed that the surveyor from line or course 93 to 113 should depart from the southern line of the land assigned by the decree to Domingo and Vicente, and hug the northerly *banks of the creek* to its outlet in the bay of San Francisco, so that from the beginning of line or course 94 to line or course 113, the lines of this portion of the grant should nowhere be coincident with the southern line of Vicente as defined in said decree, and gave it no western line on the bay until the survey reached the headland on the north side of the entrance to the creek on its bank in course 101. It necessarily also rejected that call of the description in the decree "the southern line being the line of division between this land and the land of *Antonio Peralta*, which line extends *from the said bay* to the most eastern boundary of the rancho of San Antonio."

In considering the jurisdiction of the Court we find no language which more aptly defines and limits it in this matter of survey than that used by this Court in The Fossatt Case, 2 Wall. 709, with a few local changes, as follows:

"This direction of the Court not only reformed the survey of the tract as made by the surveyor general, but reformed the decree of the Court itself entered in 1855, as amended in 1859, in pursuance of which the survey had been made. The Court assumed that the survey and location of the tract was not to be governed by the decree, but, on the contrary, that it was open to the Court to revise, alter, and change it at discretion, and to require the surveyor general to conform his survey and location to any new or amended decree; for certainly if it was competent to change the *western* line of the grant and claim, or the *southern* line of Vicente's land, or the northern line of Antonio's land, it was equally competent for it to change every other line or boundary as there described and fixed.

Now, it must be remembered that this decree of the District Court designated with great exactness the northern, southern, eastern, and western lines of the claim presented in the petition to the board, the claim confirmed, was entered in pursuance of and in accordance with the mandate of this Court, and by which the District Court was instructed that the northern, southern, and western external lines of the claim declared in it were in conformity with the opinion of this Court, and that the other line—the east line only, remained to be completed by a survey to be made, which would locate upon the ground the crest or

comb of the Sierra; the termini having also been ascertained and determined by this Court.

This radical change, therefore, of these lines of the tract involves something more than a change by the Court of its own decree; *it is the change of a decree entered in conformity with the mandate of this Court.* But we do not intend to place any particular stress upon this view, for we hold that it is not competent for the Court to *depart from its own decree* in the exercise of the power conferred by the act of June 14th, 1860. The duty enjoined is not a rehearing of the decree on its merits; it is to execute it, to fix the lines on the ground in conformity with the decree entered in the case. The decree is not only the foundation of the *validity of the grant,* but of the proceedings in the *survey* and *location* of the land confirmed.

The duty of the surveyor general, under all the acts of Congress in the matter of these surveys, is to survey and locate the confirmed *tract* in conformity with the decree. It is the only guide which is furnished to him; and one of the first instructions from the land office is as follows: "In the survey of finally confirmed claims you must be strictly governed by the decree of confirmation; and when the terms of such decree are specific, they must be *exactly observed* in fixing the *locality* of and surveying the claim."

"This instruction was given under the act of 1851, and in relation to the private land claims of California, and it was in accordance with this instruction that the survey of the land assigned to Domingo and Vicente Peralta was made and approved by the surveyor general March 3d, 1860, and filed in the court below August 10th, 1860, and which was rejected" and reformed by the Court below by the alteration of the southern and western lines, as shown by the survey.

After various proceedings by the District Court looking to the conformity of the survey with its *substituted decree* of November 22d, 1862, and the correction of certain surveys made by its direction,

Record, page 18, fol. 38-43,

the District Court passed its decree of June 5th, 1871, modifying its decree of November 22d, 1862, preserving, however, *the new lines thereby fixed;* setting aside the modified survey theretofore made, and again ordering the surveyor general to change the lines of the original survey, as so directed, and make due return.

This modified plat was filed July 26th, 1871.

Record, page 21, fol. 44,

and was followed at fol. 45 by a decree confirming such modified survey.

Thereafter, and in the year 1877, the Commissioner of the General Land Office caused a patent for the land so *surveyed* to be made and recorded.

Record, page 23, fol. 49.

Examination of the plat of this survey (Exhibit "B") will show that it does not conform to the decree.

The new decree of 1862, reversing, annulling, and setting aside the said decree of 1855 as amended in 1859, and the substitution of such new and different decrees, and its further decrees of 1871, were without the jurisdiction of the District Court. These decrees were not only void, but could not be the foundation of any valid proceedings under them.

U. S. vs. Levy, 13 Pet. 81.
U. S. vs. Forbes, 15 Id. 173.
Higueras vs. U. S., 5 Wall. 833.
Grisar vs. McDowell, 6 Wall. 377.
U. S. vs. Rico, 27 Fed. Cas. 806, 809, No. 16,160.

We have appended hereto a copy of the survey of 1871 marked Exhibit "B," and also a copy of the recitals contained in the patent of 1877, marked Exhibit "C."

The attitude of the District Court to the questions presented to it on the survey in question is very fully set forth in its opinion in this case reported in 27 Federal Cases 497, where that Court says:

"*It is not pretended that this Court has any power to reverse or annul its own final decrees* for errors of fact or law, after the term at which they were rendered, unless for clerical mistakes, * * * *still less has it any such power over the final decrees of the Supreme Court*—its duty being to execute the mandate, * * * but further, it is contended that by the act of 1860 all questions of location and boundary are referred to this Court, to be determined in a *new proceeding between new parties and on additional evidence.*"

U. S. v. Rico, 27 Fed. Cas. 806, 809.

After giving a deraignment of the title from Sola and description of the land whereof juridical possession was delivered to the grantee by Martinez, the learned Court says, on page 499, that "*the only tract to which Sola's grant could have referred was the tract of which the possession had been given by Martinez, and which is described in his report.* If, then, on

further examination it appears that the land described in the decree affirmed by the Supreme Court is not the same whereof possession was given by Martinez, it has appeared to me to be the duty of this Court under the Act of 1860 to conform to the obvious intention of the Supreme Court, rather than to the mere letter of its mandate, *and to cause to be surveyed to the claimants the tract of which Martinez gave possession, and which he describes in his report.*"

(This is exactly what the District Court did not do.)

"*I, therefore, think myself at liberty to inquire, not merely whether the official survey is in accordance with the terms of the decree of this Court affirmed by the Supreme Court, but whether it is in accordance with the possession given by Martinez, upon which the judgments of both Courts were founded.* * * *

But the opinion of the Supreme Court shows as clearly as if it had been so stated in the decree that the land intended to be confirmed was that described in the title papers; and the decree of the District Court is affirmed and adopted, because it was supposed to describe the same land, no suggestion to the contrary appearing to have been made or considered."

(The land described in the decree in this case and in the title papers is the Rancho of San Antonio as it was granted to Luis Peralta.)

At page 501, the learned Court says:

"The official survey is also objected to on the ground that it embraces lands on the *shores of the bay* below the ordinary high-water mark. These lands have been treated as having passed to the State of California as incident to her sovereignty on her admission to the Union, and they have been disposed of by the State as her own. I *do not understand it to be denied that the call in the grant for the bay as a boundary, bounds it by the shores of the bay.* * * *

It seems from the deposition of Stratton (the surveyor) that the official survey embraces lands below ordinary high-water mark, and in this respect it is evidently erroneous.

I think that the *western boundary should therefore be modified,* so as to exclude those lands lying below that limit, whether they be situated *on the bay itself or on the shores of any navigable estuary that may extend from the bay into the interior.*"

The instructions to the surveyor sent him *over three miles* into the interior, to the eastward of the bay, to discover its *shore,* and find the westerly line of the rancho; and also three miles inside the lines established by the decree of juridical possession.

See Exhibits—the plats of survey.

Van Reynegom vs. Bolton, 95 U. S. 35.

THE PUEBLO LANDS IN SAN FRANCISCO were described in the decree of confirmation as being bounded on the *east* by the bay.

Stratton, the deputy surveyor who had received and acted upon the instructions given in the decree in the Peralta case, afterward made a survey of the Pueblo lands.

In running the eastern line along the bay when he reached Mission Creek, emptying into the bay, having in mind the instructions in the Peralta case, he ran the line into the interior on the right bank of the creek a distance of about a mile, crossed the creek, and ran the line back on the left bank to the bay; extending back from the creek on each side so as to exclude from the survey a large tract of marsh land.

This method of surveying, instead of running the line across the mouth of the creek from headland to headland, was condemned by this Court as a departure from the description in the decree, which bounded the claim on the bay.

This Court approved as a proper survey one which ran this line across the mouth of the creek from headland to headland, and included the lands omitted by the Stratton survey.

The views of the heads of the Land Department, and of the Coast Survey in their official capacities, were cited by this Court in like condemnation of such method of survey.

Knight vs. United Land Assn., 142 U. S. 169, 195, 205-210.

See, also, the Map in 153 U. S., page 22.

Compare with *Exhibit D.*

Record, page 28, fol. 52g.

The learned District Judge lays down the proposition in the opinion quoted that he has no power to reverse or annul the decrees of the District or Supreme Court. With this proposition as his guide, he finds it to be his duty under the act of 1860 to depart from the decree, and change and modify a line of the grant and claim as confirmed ("which line along the bay constitutes its western boundary"), as described in the decree; by determining that the survey must ascend the creeks and sloughs, and omit the lands below the *banks* of the creeks and sloughs, notwithstanding they are included in the grant and juridical possession as described by Martinez, and which lands (he says) the Supreme Court intended to confirm, and did confirm, to Peralta by its decree affirming the decree of the District Court. Also to change and modify the southern line of the land assigned to Domingo and Vicente Peralta.

This was exactly what this Court held in the Fossatt Case was wholly without the *jurisdiction* of the District Court.

The Fossatt Case, 2 Wall. 714.
U. S. vs. Rico, 27 Fed. Case, 807.
Grisar vs. McDowell, 6 Wall. 377.

This line cannot be changed by the surveyor general or any department of the Government.

Tripp v. Spring, 14 Fed. Cas. No. 14,180 (5 Sawy. 209, 215).

Courts do not *sua sponte* execute their own decrees. They await action of the parties.

The District Court had never been asked to do any act in execution of the decree of confirmation until the present motion was made.

The Court had never, on the application of any person, or of its own motion, ordered to be brought before it a survey of the confirmed claim; and no such survey has ever been considered or adjudicated upon by the Court.

Few, if any persons, except the recording officer, have had occasion to read the patent of 1877. Its regularity and sufficiency have been assumed without question.

Upward of twenty years elapsed between the entry of the decree in 1855 and the date of the patent, and during this time a commercial city of upward of 30,000 inhabitants had grown up with daily transactions in its real property, based on the title established by the decree.

The infirmities of the survey and patent have never been brought to light until on the hearing of this motion they were exposed to the court below, and by it *ignored*.

The Peralta title is constantly recognized in the daily transactions in respect of the 46,685 acres confirmed, with the exception only of the 2,352 acres, which Judge Hawley figures out as having been lost in some mysterious manner between the entry of the decree and the date of that patent.

Assuming that the decree of 1871 is the *final decree*, that it superseded the decree of 1859, and that the patent of 1877 is in conformity with such decree of 1871, the learned Judge of the District Court says;

"The merits of this case have been settled by the final decree of this Court and the patents issued in conformity therewith."

Record, page 51, fol. 95.

And that is why he saw his way clear to deny this motion.

The averment that the decree of 1859 had not been executed by the issuance of a patent is admitted by the demurrer, and is conceded by the United States.

Record page 25, fol. 52.
Record page 28, fol. 52g.

We quote from the opinion as follows;

"I am of the opinion that this Court, after the rendition of the decree of 1859, under the provisions of the statutes of 1851, 1860, and 1866, retained jurisdiction of the cause, and had the power and authority to reject or approve *any survey* thereafter made, or *to otherwise change or modify the decree.* * * * This was accomplished by the orders and decrees of the Court made in 1871, *and the decree approving the survey must therefore be treated as the final decree of this Court,* * * * that subsequent thereto a patent was issued in conformity therewith. This Court was thereby deprived of any further jurisdiction in the premises."

Record, page 43, fol. 80.

"The question of the sufficiency of the petition to require an answer is alone involved. To determine this question it is only necessary to inquire and decide whether from the averments in the petition and the so-called demurrer, the decree of 1859 is the final decree of this Court, and whether this Court has any jurisdiction to order a patent to be issued as prayed for by the petitioner."

Record, page 45, fol. 84.

"I deem it unnecessary to discuss at any length the provisions of said section 8, because if the decree of 1859 *is not the final decree,* that act has no application to the proceeding herein. If the Court retained jurisdiction under the acts of 1851, 1860, and 1864, up to the time of the decree of 1871, and thereafter until the patent was issued, that fact disposes of the motion made by the petitioner. *The act of 1866 is not, and could not be, applicable to this case, except upon the theory of the petitioner that the decree of 1859 is the final decree.*"

Record, page 49, fol. 90.

"If the patents issued, in pursuance of and in conformity with the decree of this Court in 1871, approving the survey made by the surveyor general, are (as hereinbefore declared to be) valid, then it necessarily follows that the relief asked for cannot be granted."

Record, page 50, fol. 92.

The learned Court below also said:

"If the decree of 1859 was final in the sense that it determined the validity of the grant, *it was not a final decree in the full sense of that term,* because it did not determine the correctness of the survey, and could not do so until it was made by the surveyor general and *presented to the Court.*"

Record, page 44, fol. 80.

In so saying the learned Court lost sight of the distinction between the decree and its execution, between the vocation of the Court and that of the surveyor, under the act. The decree determined the validity of the grant and its location; that was the function of the Court. The surveyor was to ascertain by survey its location on the ground. That was the function of the surveyor.

The Fossat Case, 2 Wall. 714.

There is nothing in the acts of 1851 or 1860 requiring *submission by the surveyor of his surveys of private land claims to the District or any other Court.*

Miller vs. Dale, 92 U. S. 477.
McCreery vs. Haskell, 119 U. S. 333.
Castro vs. Hendricks, 23 How. 442.
U. S. vs. Rico, 27 Fed. Cas. 808.
U. S. Sepulveda, 1 Wall. 104, 107.

He was to survey the confirmed claim as it was located by Mexico. If he surveyed anything other than the confirmed claim, he was acting outside of the powers conferred upon him.

Bissell vs. Henshaw, 1 Sawy. 589 (F. C. 1,447); S. C., 18 Wall. 262.
Supervisors vs. U. S., 4 Wall. 435, 446.
The Fossat Case, 2 Id. 649, 714, 727.

If the Court below erroneously rejected his survey, and erroneously instructed him to survey another and different claim under another and different decree, could that Court, or the surveyor acting under its instructions, thus destroy the right of property established by the decree of this Court?

Naturally, a survey can only interpret the decree under which it is made. It cannot be made to fit any location other than that which is *described in the writing.*

If an approved survey did not embrace all the lands confirmed it could not operate to take away from the confirmee the omitted lands. Such a result would give the surveyor power to re-

verse the decree itself; and give him jurisdiction to determine the title to the omitted lands—to establish their ownership; to *grant* them to some one other than the confirmee.

12 Stat. at Large, chap. XC, page 410.

If operative upon the lands surveyed, *it left the title to the omitted lands where it was placed by the decree.* That land would still be the property of the confirmee. *Its omission from the survey could not be translative of title to any other party.*

Adam vs. Norris, 103 U. S. 594.
In re Pueblo, 5 Land Decisions, page 491.
Tripp v. Spring, supra.
Fremont v. U. S., 17 How. 542, 563.

If a man has really acquired title to land, he cannot afterward be *mapped out* of it by other persons.

Payne vs. English, 79 Cal. 547.

The undisputed testimony of the land department shows that no effort was made to execute this decree except by surveys of several portions of the confirmed grant whereby there was omitted from survey a large portion of the land confirmed.

See opinion of Assistant Commissioner Best.

Record, page 25, fol. 52.

See opinion of Assistant Commissioner Mondell.

Record, page 27, fol. 52d.

And that the patents issued upon such surveys omitted the lands which had been omitted from those surveys.

Record, page 26, fol. 52b.
Record, page 28, fol. 52g.

The answer made by the demurrer that the decree of 1859, was reversed by the District Court, and new boundaries substituted for the boundaries established by the decree, that whether those boundaries conformed to the decree of confirmation was a closed question, which this Court had no jurisdiction to inquire into, was a mere evasion. That when the question to be considered was conformity of the survey and patent with the decree, this Court was powerless to say to the District Court —this is not the decree we directed you to execute; this is not the land whereof confirmation was made by you; we must accept as a conclusive answer to our mandate, that any survey however erroneous, however divergent, from the lines of the

decree, is full performance of our mandate requiring execution of your decree.

If a survey which confessedly omits 2,352 acres of the land in the tract confirmed is execution of the decree, why not a survey which omits one-half or three-quarters of the land? If one acre can be lost by survey, why not the whole tract?

If in execution of the mandate the District Court had discretion to extinguish any, why not all of the boundaries of the tract? One boundary is as vital to the integrity of the decree as any other, and any change of boundary created a new decree, and in effect reversed the decree of this Court.

If the District Court could change any boundary, it would be because it had jurisdiction to try anew the issue submitted to and determined by this Court on the former appeal.

Chaires vs. U. S., 3 How. 619.
U. S. vs. Knight, 1 Black. 489.
Taylor vs. Maguire, 17 Wall. 283.
Re Sanford Fork & Tool Co., 160 U. S. 255.
U. S. vs. DeRodrigues, 7 Sawyer, 646.

There is no foundation for the assertion that the United States has performed her political obligation in respect of this property.

On the contrary, it abundantly appears by the opinions of the land department and of the Courts, that she had not performed it.

Mr. Commissioner Best says:

"The parties named show that they are the owners respectively of an undivided interest in said rancho, and ask that a new patent be issued including not only the lands already patented, but also the land covered by the waters of San Antonio Creek, which is not included in the patents heretofore issued."

Adding that *"the contention of the petitioners is to the effect that as the bay of San Francisco is the western boundary of said grant as confirmed, they are entitled to a patent for the lands covered by the waters of San Antonio bay (creek), and request the issue of a second patent to the Peraltas for the whole of the grant, including the land under the waters of said bay (creek)."*

Record, page 25, fol. 52.

Mr. Commissioner Mondell, addressing the surveyor general in respect to the plat of survey of 1895, says:

"This is the only map, purporting to be a map of the entire rancho, which has ever been prepared and filed. Upon this map

you have so extended the western boundary line from headland to headland along the shore of the bay of San Francisco as to include therein area of about one thousand five hundred and fifty acres for the so-called San Antonio bay (creek), and of about eight hundred and two acres in the San Leandro bay, which were explicitly excluded from the approved surveys upon which patents were issued."

Record, page 28, fol. 52g.

The District Court, presided over by Judge Hawley, says in 99 Fed., page 625:

"The quantity of land claimed (confirmed?) embraced about 46,685 acres; embraced in the patents was only 44,333 acres, being 2,352 acres less than was included in the survey of 1895." And this, says the commissioner, was the only survey of the grant ever made.

Record, page 44, fol. 82.

In the face of these assertions and admissions, upon what pretext can the Department of Justice be heard to demand affirmance?

U. S. vs. Flint, 4 Sawy. 58.
Tripp v. Spring, supra.

This Court will take judicial notice of the geography and topography of the rancho as shown on the maps of Alameda County, California. *It appears from these maps that San Antonio creek and San Leandro bay are not portions of the bay of San Francisco; that they are within the exterior lines of the grant, and lie to the eastward of the* westerly boundary of the grant. Compare with survey of 1895, and chart of United States coast survey of 1859, copies of which surveys, and of the material portion of the chart are hereto attached as exhibits, and the latter is marked Exhibit "D."

The political obligation of the United States to perfect and protect titles derived from Spain or Mexico, delegated by Congress to this Court, cannot be completely performed in respect of this rancho until this Court shall have adjudged execution of its decree in this case.

The power of the United States to patent the confirmed claim is a continuing power, and can only be exhausted by its complete performance.

Adam vs. Norris, 103 U. S. 591.

No mere lapse of time can toll the right of the claimants to execution of the decree.

Act of 1851, sec. 13.
U. S. vs. Pacheco, 22 How. 225.
Henshaw vs. Bissell, 18 Wall. 255, 270.

Counsel for appellants are not aware of any question having arisen in this case, as stated by the Court below, whether the State of California had the superior right by virtue of its sovereignty, over the tide and submerged *lands in San Francisco bay* (p. 625).

Record, page 44, fol. 81.
Act of July 23d, 1866, sec. 1, 14 Stat. 218.

Whether the State had title to any of the lands of this rancho was involved in the consideration of the surveys brought before the Court. The pretense on which Carpentier and others were admitted to contest those surveys, was that they had derived an interest from the State of California in lands covered by the waters of San Antonio creek.

Record, page 16, fol. 35.
Record, page 28, fol. 52f.

It was as to lands of this rancho under water that Carpentier had contended that he had derived title from the State because they were *tide* lands; with respect to which, when the United States acquired Alta California she held them only in trust for the future State. *This would have been so had those lands belonged to the public domain of Mexico.*

Knight vs. U. L. A., 142 U. S. 185.
Tripp vs. Spring, Fed. Cas. No. 14,180.

If the lands in question are within the boundaries established by the decree of 1859, they belonged wholly to the Spanish grantee; the United States could not, and did not, hold them in trust for the future State; *could not and did not become source of title in the State of California,* or her assigns.

Ibid.
Lowndes vs. Huntington, 153 U. S. 22.
Teschemacher vs. Thompson, 18 Cal. 87.
U. S. vs. Conway, 175 U. S. 70.

The United States held them in trust for the grantee of Spain, and on the passing of the decree, became *trustee* for the confirmees.

Barney vs. Dolph, 97 U. S. 652, 656.

Why the United States or claimants under her were admitted to contest any survey except survey of the *exterior* lines of the grant, is not apparent; unless for the reason that error begets error.

U. S. vs. Estudillo, 1 Wall, 719.

The parties carrying on the contest about the survey in question had no interest therein. They were fighting a sham battle over other people's property rights. And the issue of such contest could not be the foundation for a decree affecting the property rights of the real owners.

U. S. vs. Estudillo, 1 Wall, 719.
Miller vs. Dale, 92 U. S. 477.

In determining by a summary *ex parte* proceeding that the assigns of the State had such an interest therein as made it proper that they should be heard in opposition to the survey approved in 1871, *the District Court did not pass upon any question of title.* The act of 1860 dealt with *surveys only,* and not titles; did not invest the Court below with power to endow Carpentier with title to the property of Peralta. *That* Court was only given jurisdiction of *land confirmed* to ascertain if *its* survey conformed to the decree. *It got no jurisdiction over land which it might decide was improperly included in the survey;* could not determine its title.

Ibid.
Potter vs. Randolph, 58 Pac. Rep. 905.

We annex a copy of the recitals of the patent to Domingo and Vicente, marked Exhibit "C."

Assuming that the District Court had power to assign a portion of these lands to Vicente and Domingo Peralta by its decree of 1855 as amended in 1859, that decree has never been executed pursuant to the mandate of this Court by survey on the ground followed by patent.

Knight vs. United Land Association, 142 U. S. 200.
Lowndes vs. Huntington, 153 Id. 1, 22.

In further illustration of the insufficiency of the approved surveys under the Peralta grant to show conformity of survey with decree, we direct attention of this Court to the portion of the rancho, which the Court below says was confirmed to Antonio Peralta and to its decrees, surveys, and patent, hereinafter set forth.

The patent issued to Ygnacio Peralta also excluded the lands

covered by the waters of San Antonio creek and San Leandro bay, as will appear from the records of the land department; to which we call attention of the Court.

The issued patents were, however, records of the Government of the existence and validity of the *grant*, and establish the title from the date of the grant.

Teschemacher vs. Thompson, 18 Cal. 26.

The decree assigning a portion of the grant to Vicente and Domingo Peralta gives its western and southern bounds as follows:

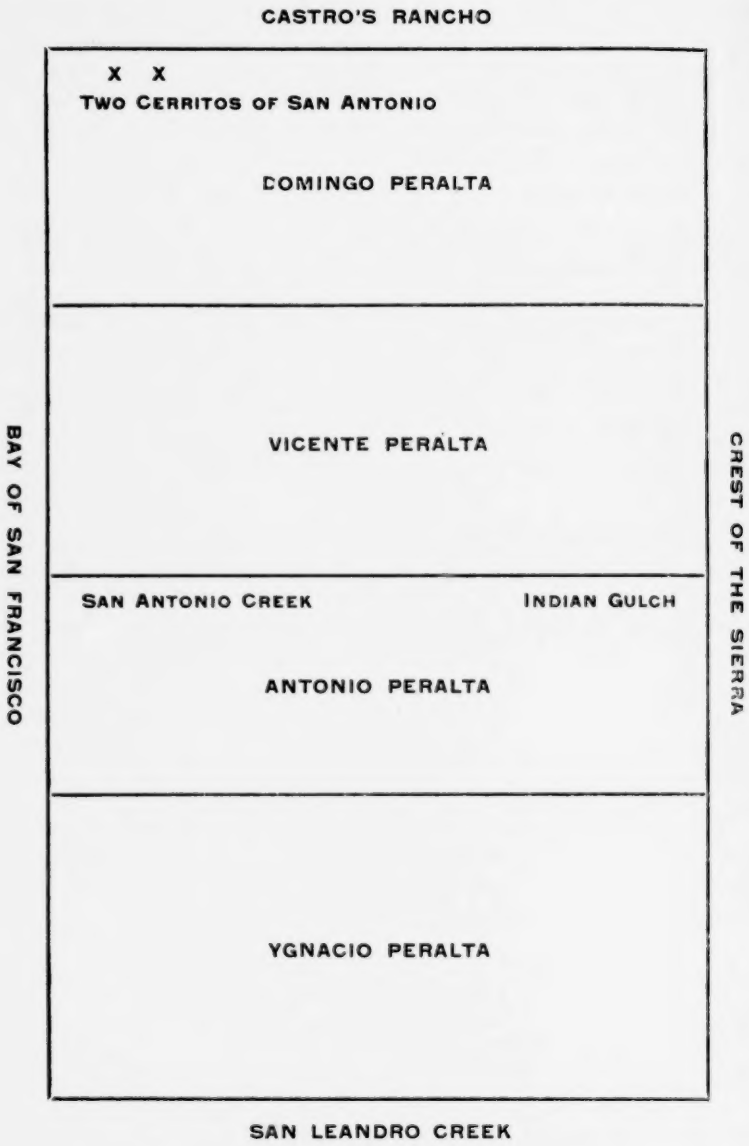
On the west by the bay of San Francisco, and *on the south* by a ravine a short distance south of the buildings in the town of Oakland; on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio.

Record, page 7, fol. 14.

The decree assigning a portion of the grant to Antonio Peralta gives its northern and western bounds as follows:

On the *north* by a ravine a short distance south of the buildings in the town of Oakland; on the north of which ravine there is a small house in sight of the public road, being the division line between the lands hereby confirmed and the lands confirmed to Vicente and Domingo by said decree of the 26th of January, 1855; on the west by the bay of San Francisco, and on the east by the comb of the Sierra.

Reading these decrees together it will be seen that the *southern* line of Vicente is coterminous throughout with the *northern* line of Antonio. An accurate survey of both tracts must bound one by the other.



THE RANCHO OF SAN ANTONIO

Exhibited in the form of a rectangular parallellogram. Divided into four parcels as contemplated in the stipulation recited in the patent to Antonio.

Antonio Peralta had presented his petition to the board, claiming title to portion of the rancho under the grant and the devise; and on February 7, 1854, the board had made a decree confirming this claim.

December 4, 1855, the District Court made a decree affirming the decree of the board.

Appeal from this decree was taken to this Court, in the year 1856.

This appeal was dismissed *October 20, 1857*, whereby the decree of December 4, 1855, became final.

In the meantime, and on the 29th day of January, 1857, *pending the appeal*, the District Court made a decree annulling and setting aside the decree appealed from, and substituting another decree in its place.

Thereafter there was ordered into court a plat of survey of the portion assigned to Antonio *by the decree of January 29, 1857*. This survey was approved by the surveyor general October 19, 1858, and certified by him; and objections to it having been made, heard, and considered, the District Court, February 3d, 1863, rejected the survey, and by its decree of that date changed and modified the boundaries established by the former decree; changed all the lines and courses thereof between the lines or courses 53 and 68, so as to run along the inner line of the shore, excluding from said survey, *and from the lands confirmed* the waters of the bay of San Francisco *and of the arms thereof*, and the lands covered thereby, and directed that a re-survey be made conformably to such new decree.

We annex a copy of this rejected survey, marked Exhibit "F."

A new survey was made and approved by the surveyor general conformably to the said decree of 1863, and the plat of that survey was afterward confirmed by the Court.

We have annexed a copy of this plat marked Exhibit "E."

Under this decree the Land Department made and recorded in the year 1874 a patent to Antonio for the lands so surveyed.

We annex a copy of the recitals in this patent marked Exhibit "G."

The decree of December 4. 1855, being the final decree in this case (Antonio's), and no survey of it ever having been made or approved, the patent issued to Antonio Peralta was void on its face for want of conformity to such final decree.

A judicial decree cannot create title. It can ascertain and determine that title exists and in whom it is vested. In respect of the lands ceded by Mexico to the United States it can ascertain and determine whether any, and what part of it is private

property, and who appears to be its owner, with a view to its conveyance to such owner by the United States.

Neither does a patent from the United States *create title.* It is recognition of a pre-existing vested right. It is evidence of an existing title in the lands patented.

Cornelius vs. Kessell, 128 U. S. 456, 461.

The patent is the mere ministerial act of the officer charged with the duty of making it.

U. S. vs. Levy, 13 Peters, 81.
U. S. vs. Forbes, 15 Id. 182.
Simmons v. Wagner, 101 U. S. 261.
Tripp v. Spring, supra.

The act imposing the duty is a limitation upon the powers conferred. The land *granted* or confirmed is to be surveyed, and when surveyed is to be patented. But the *granted lands* and the *surveyed lands* must be the same to sustain the patent.

The Government must have granted the land or the judiciary must have ascertained that the land to be patented had been previously granted; that it is the property of the proposed patentee; and that an obligation rests on the patentor to patent it to him.

Hence, in order to be valid, the patent must show on its face a grant or decree, a survey in strict accordance therewith, and be a conveyance of the land granted or decreed.

If the legal title to lands *wrongfully* omitted from the patent remains in the United States, it is the duty of the officer who committed the error of omission to repair it by issuing a *new patent* which will include such omitted land.

Adam vs. Norris, 103 U. S.
Cornelius vs. Kessel, 128 Id. 456, 460.
Knight vs. United Land Assn., 142 Id.

A title established by judicial decree cannot be impaired by the act or omission of a ministerial officer. If the law directs him to make a patent for the title so declared, the duty devolves upon him in respect of the land confirmed until he has fully complied with all the requirements of the law.

Otherwise the patent is the grant; is the source of title, and the typewriter or scrivener who prepared it is the grantor.

If the grant or decree is for one thing, and the patent for another, one must fail. The grant or decree having established the title, the patentor cannot reverse either, and his action in

so doing is void. His void act cannot be imputed to the United States. Neither can the United States shelter herself behind this void act, as being performance of the duty enjoined upon her by Congress.

In this proceeding we have:

I.

a. Grant *with livery* by Spain to Luis Peralta of the whole of the rancho of San Antonio in 1820.

b. Succession under the laws of California in the four sons of the grantee.

c. Decree of the District Court affirming the grant and the claim of title of the sons.

d. Decree of the Supreme Court affirming this decree, and its mandate to the District Court directing execution.

e. Final survey of the land confirmed duly approved by the surveyor general.

f. Exhibition of decree and plat of survey to commissioner, and demand of patent.

g. Refusal of the land department to make a patent.

h. Motion to the District Court for execution of the decree.

i. Order denying motion.

j. Appeal from this order to this Court.

II.

a. Grant by the District Court (?) by its decree of January 26, 1855, to Domingo and Vicente Peralta of a portion of these lands.

b. Decree of this Court affirming this concession (?).

c. Decree of the District Court reversing the decree of this Court, and substituting for it new decrees of 1862 and 1871 for other lands.

d. Approved survey of the land described in the new decrees.

e. Patent for the land so described, reciting the decrees of 1855 and 1862, and a plat of survey under said decree of 1871, omitting 2,352 acres of the "*lands confirmed.*"

This error is confessed by the District Court in its decree of November 22d, 1862, in its direction to the surveyor to exclude from survey of "the *lands confirmed* the waters of the bay of San Francisco, *and of the arms thereof,* and the lands covered thereby."

Record, page 17, fol. 38.
See, also, U. S. vs. Peralta, 27 Fed. Cases, pp. 497, 501.

This error is confessed by the Land Department.

Record, page 26, fol. 52b.
Record, page 27, fol. 52e, f, g, and h.

III.

a. *Grant by the District Court* (?) by its decree of December 4th, 1855, to Antonio Peralta of a portion of the lands of the grant.

b. Appeal to this Court therefrom, perfected in the year 1856.

c. Pending this appeal, and on January 29, 1857, decree of the District Court reversing and setting aside said decree of December 4th, 1855, and substituting another decree therefor.

d. Decree of October 20, 1857, dismissing the appeal to this Court with leave to claimant to proceed under the decree of December 4, 1855, as on final decree.

e. Decree of the District Court of February 3d, 1863, reversing and setting aside decree of December 4, 1855, and substituting for it, its said decree of 1863 for other lands.

f. Survey of the land described in this new decree, the decree of February 3d, 1863, approved by the District Court.

g. Patent for this land reciting the said several decrees of 1855, 1857, and 1863; and survey under the decree of 1863, omitting from the tract surveyed 2,352 acres of the *"land confirmed."*

See exhibit G.

This error is confessed by the District Court in its decree of 1863, directing the surveyor "to exclude from the *lands confirmed* the waters of the bay of San Francisco, and *of the arms thereof*, and the lands covered thereby."

And by the land department.

Record, page 27, fol. 52e, f and g.

IV.

A similar decree and patent to Ygnacio Peralta for the extreme *southern* portion of the grant with the *like* omissions.

It is only when the patent shows upon its face that it is made in conformity with the requirements of law that it is unassailable.

A patent which should recite a grant of a lot of land in the city of San Francisco, a survey of a lot in the city of Oakland, and a conveyance of the last-named lot, could hardly be sustained by any tribunal.

A patent not authorized by law is void.

Burfenning vs. Chicago etc., 163 U. S. 321, 323.

Where a patent has been wrongfully made and recorded by inadvertence or mistake of the land department, it is the duty of this Court and it has jurisdiction to set aside the patent that the land department may have an opportunity to correct its mistake.

Where, as in the case at bar, the land department has mistaken its power, and refused a patent, and the mistake of the department is based upon errors of the District Court; and the case is still *sub judice* on the question whether that Court has obeyed the mandate of this Court, can it be that this Court has no power to correct the errors and mistakes of both of them, and restore to the Court below jurisdiction to execute the mandate and of the land department to correct its mistake?

Germania Iron Co. vs. U. S., 165 U. S. 379, 383.
Duluth & Iron Range R. Co. vs. Roy., 173 Ind. 587.

If the title to one acre of this land was vested in Luis Peralta and passed to his successors in interest, then the title to *each acre* of the remaining 46,684 acres is in like manner vested in such successor.

The title to each acre passed by the grant by one instrument; by will to the four sons, by one instrument; confirmed by one and the same decree. If there is no title in them to any *one* of the acres, they can have no title to the remaining acres. If they have title to one acre they are entitled to all the acres. If the United States has title to any one of the acres, except through Peralta, she owns all. Her Courts committed a grievous error in depriving her of any portion of her property, and giving it to Peralta.

The recent census shows the population of Oakland and vicinity within the limits of the grant to be upwards of 150,000. At least one-tenth of this number own, by title derived from Peralta, the land they occupy.

Each one of these land holders is interested in the execution of the decree of 1859; each one of them is interested in having a valid muniment of title to his land. Each one of them, as well as appellants, is entitled to demand from this Court in a separate proceeding, that the United States execute the decree of confirmation.

The land department must obey the law, and this Court has jurisdiction to compel obedience.

If the department mistakes the law and makes out and records patents, for which there is no warrant in the law, its acts concern only it and the United States.

U. S. vs. Stone, 2 Wall. 535.

It must act under the decree of the Court ascertaining the ownership, and unless and until its patent conforms to the decree, its action cannot be sustained.

Beley vs. Naphtaly, 169 U. S. 353.

If Courts have power to enforce the specific performance by a private litigant of his contract to convey real property, they have the power over the United States to compel specific performance of her contract to convey.

The naked legal title is in the United States. It can only pass by survey and patent. The survey has been made by her authority; but she refuses to patent the land surveyed.

Appellants are not complaining that a patent for the confirmed claim has been made to the wrong person. Their cause of complaint is that *no patent for such claim has been made to anyone.*

The United States can commit no error in conveying the granted lands to the appointee of this Court. If her ministerial officers obey the decree of the Court and the act of Congress by making the patent, the responsibility will not rest upon the land department or the Department of Justice; but upon Congress, which gave the Court jurisdiction to make the decree; and upon the Court which made it, and required it to be executed.

The authentic evidence of what is private property is to be found in the grants of the Government of California. The grant to Luis Peralta passed to him a present and immediate interest; unless that interest has been forfeited and revested in the Government, the United States is bound in good faith to uphold and protect it.

This Court has defined one office or function of a patent under the act of 1851, "As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land."

Beard vs. Federy, 3 Wall. 491.
Langdean vs. Hanes, 21 Id. 521.
U. S. vs. Conway, 175 U. S. 70.

But it performs another office.

This Court says in the Beard case:

"The patent is a record of the action of the Government upon the title of the claimant *as it existed upon the acquisition of the country.* The inhabitants were entitled by the law of nations to *protection of their property rights, to the same extent as under the former Government.* The treaty of cession also stipulated for such *protection.*"

Beard vs. Federy, supra.

The *protection* provided for was protection against spoliation by the people represented by Congress, by the special sovereignties which might spring into being in the ceded territory, or by the Courts of either sovereignty.

Strother vs. Lucas, 12 Pet. 438, 439.
Story on the Constitution, sec. 1330.
U. S. vs. Flint, 4 Sawy. 47, 65, 70.

When the United States makes the patent provided for in the act of 1851, it is her solemn declaration that she has completely performed the obligation of *protection* imposed upon her by the treaty.

That she thereby invests the confirmee with the evidence of his title, which will guarantee it to him in like manner "as if the same belonged to citizens of the United States," and entitle him to the recognition and protection of his future sovereign, the State.

Fremont vs. U. S., 17 How. 542, 553.

Will enable him to assert and maintain his title in the courts of the United States and of the State, from the date of the patent, unaffected by previous adverse legislation by either Government.

Henshaw vs. Bissell, 18 Wall. 255, 270.
Los Angeles vs. Thompson, 117 Cal. 601; S. C., 180 U. S. 72.
Botiller vs. Dominguez, 130 U. S. 247-254.

It is this quality of the patent which constitutes its chief value.

It enables the claimant to say: *"This is my property."*

When such patent shall be made, the aim of the statute, expressed in its title to "settle private land claims," will have been attained.

Mr. Justice Miller delivered the opinion of this Court in the case of Adam vs. Norris, 103 U. S. 591.

The action was ejectment. Both parties claimed the legal title under patents from the United States issued upon confirmed Mexican grants and based upon surveys approved by the general land office. Each patent included the land in controversy.

The defendant's grant was for the Rancho Guadalupe, and was dated March 21, 1840, followed by patent in 1870; the plaintiff's grant was for La Punta de la Laguna, and was dated December 29, 1844, followed by patent in 1873.

The defendants thus held the older grant from Mexico and the older patent from the United States.

The plaintiff's survey was approved by the surveyor general January 29, 1861, after certain proceedings had under the act of 1860. The defendant's survey was in like manner approved in June, 1867.

A patent was made out and recorded for the Guadalupe Rancho in 1866, which omitted a portion of the lands confirmed, of which the demanded premises were also portion.

This patent was not satisfactory to the patentee who called the attention of the commissioner to the omission in question; and that officer ordered a new survey, by which the omission was repaired, and this was followed by the patent of 1870.

Counsel for the plaintiff argued that his *survey* had the same effect and validity in law under the act of 1860 as a *patent*, and that as this survey was made before the date of the patent of 1866, it gave plaintiff the title to the premises included in his survey, and the survey being the equivalent of a patent, it was final and conclusive on everybody, and that the title conferred could not be disputed in a court of law.

He also contended that the patent to the defendant of 1866 terminated the authority of the land office in the matter, and that the defendant's patent of 1870 was therefore void.

This Court held that where the United States was dealing with the public domain, the proposition that the patent is unassailable is generally, if not always, true.

But where the land had been granted by Spain or Mexico, the patent was a quitclaim—an admission that the ownership had never been in the United States, but had passed at the time of the cession to the claimant or his grantor.

Such a patent was therefore conclusive evidence only between the United States and the grantee that the latter had established the *validity of the grant*.

This Court further held that no intervening valid rights having accrued before the patent of 1870, the making of that pat-

ent was within the powers of the land office, unaffected by the existence of the patent of 1866.

That if the patent of 1866 be valid as to the land covered by it, that does not make void the patent of 1870, for land not covered by it.

The deeds are not in conflict. If the power of the land office was exhausted by the first deed, it was only so as to the land which it included. The legal title to that alone could pass by the patent, and if the title to the land now in question remained in the Government, the patent of 1870 was sufficient to convey it, and did convey it.

This Court likened the case to that of a grantor, who having failed to convey what he was bound to convey, makes another deed to correct the wrong, and held that title to the demanded premises passed by the later patent, whether or not the patent of 1866 was or was not canceled.

In the present case there were only two parties to the contest initiated by the petition to the board.

The petitioners; claiming under the grant from Spain.

The United States; claiming under the cession from Mexico.

There were no valid conflicting claims under the grant, no conflicting grants, no overlapping boundaries, and no conflicting patents.

This Court held that title passed by the grant, and adjudged the claim of the petitioners to be valid.

It also necessarily held that title did not pass by the cession to the United States, and rejected its claim of title.

The object of the petition was to obtain a decree of confirmation, and survey and patent conformably to the decree. To that the confirmees were entitled under the act.

Unless that is conceded it might as well have been decided that title passed by the cession. If, notwithstanding the decree, a ministerial officer of the United States can defeat it, why was the grantee subjected to the expense and trouble of making manifest to the Court, his rights? Why not have referred him in the first instance to the surveyor and the commissioner?

Congress imposed upon the commissioner the duty to give the confirmee a patent conformably to the grant and decree. If he did not do it; if he refused a patent, or if by mistake or inadvertence he made a patent for some land other than that granted and decreed, can it be said that the officer has performed his duty? The confirmees could not control his action or inaction; could not direct how he should perform his duty.

If the commissioner had any control over the subject it nec-

essarily embraced the examination of surveys and their correction until made conformable with the right conferred upon the claimant by judicial decree. He was invested with this power, if at all, to prevent the consequences to individuals as well as the public of accident, inadvertence, irregularity, or obvious fraud. It is only in the exercise of such power that he could make or refuse to make a patent. If then he finds upon inspection of the decree that the survey does not conform to it, it is his duty to refuse a patent. If he finds that it does conform, it is equally his duty to make a patent conformably to the decree. But the survey of 1895 became final without his approval, as we have already shown.

In such case the confirmees, being the only party interested, could consent that the commissioner go behind the record, reconsider his action, re-examine the matters intrusted to him by law, and if found to be erroneous reform such errors and mistakes. No third party could object to this course, and the United States is estopped by the decree.

This motion is persuasive evidence of such consent.

If any third party has superior rights, they would be no more affected by the correction of errors whether in the survey or the patent, than they could have been had the error never been committed.

When the commissioner considered the plat of survey of 1895 and found: "This is the only map, purporting to be a map, of the entire rancho which has ever been prepared and filed," it became his duty under the law, and the power conferred on him, to make and record a patent upon that survey.

If this survey conformed to the decree, the commissioner had no duty to perform but to obey the decree.

Congress had power under the constitution to "Constitute tribunals *inferior* to the Supreme Court."

Could not confer upon the commissioner judicial power superior to that conferred by the constitution upon this Court. The constitution was a limitation upon the power of Congress.

Martin vs. Hunter, 1 Wheat. 304.

The commissioner had the decree before him. He inserted it in the patent that he made and recorded, and he inserted in the same patent a survey which showed on its face that it did not conform to the decree.

The commissioner demonstrated in his opinions in this case that the surveys made did not conform to the decree; did not embrace all the lands confirmed.

Commissioner Best, speaking of the division line of the lands assigned to Domingo and Vicente Peralta and Antonio Peralta, respectively, says that "it appears to be a ravine, which is San Antonio creek, shown to end in San Antonio bay, an arm of the bay of San Francisco. Patent issued to D. & V. Peralta for the lands *north* of the ravine to said bay of San Antonio; *the survey running at the water line around said bay;* and patent issued to Antonio for the lands *south* of said bay and ravine; the survey and patent following *the water line of the bay of San Antonio.*

"Contention of petitioners is that as the bay of San Francisco is the western boundary of the grant as confirmed, they are entitled to a patent for the land covered by San Antonio bay, and request the issue of a second patent to the Peraltas for the *whole of the grant* including the land under the waters of said bay." Adding: "Action by the Courts upon the surveys of these claims precludes this office from further action."

Commissioner Mondell, speaking of the surveys, says that they "fixed the middle of the San Antonio creek and of the so-called San Antonio bay, as the dividing line between the lands of Vicente and those of Antonio."

That Carpentier and others claimed adversely land lying under the waters of that arm of the bay of San Francisco, known as the estuary of San Antonio, up to the highest tide lines, through mesne conveyances from the State. That the District Court sustained this contention and finally approved the survey which fixes *the lines of said grant* "to run along the inner shore, excluding therefrom and from the *lands confirmed*, the waters of the bay of San Francisco and the arms thereof, and lands covered thereby as far as the tides ordinarily flow at the full and change of the moon, and patents were issued by this office upon the survey so approved."

That petitioners contend they are entitled to a patent which *includes all the lands confirmed*, which contention cannot be sustained, and the motion must therefore be denied.

Record, page 25, fol. 52a.
Record, page 28, fol. 52f, 52g, 52h.

The case of Adam vs. Norris is only distinguishable from this, in that in Adam vs. Norris the commissioner had made and recorded a patent under the decree which omitted portion of the land confirmed by the decree.

The commissioner thereafter, at the request of the patentee and with his consent, recalled the patent, re-examined the rec-

ord, and discovering his error, made and recorded a new patent including the land omitted in the patent which he had recalled.

In the case at bar the commissioner has never made a patent for the land confirmed.

There is no patent to be accepted or rejected.

No patent to be recalled and set aside to admit of his making and recording the patent to which the confirmees are entitled under their grant and decree.

Bell vs. Hearne, 119 How. 252.
U. S. vs. San Jacinto Tin Co., 125 U. S. 318.

The treaty of Guadalupe Hidalgo was not only a contract, but it created a trust in lands of the ceded territory in favor of the grantees of Spain and Mexico.

Congress confided to this Court the execution of this trust.

Head Money Cases, 112 U. S. 598.

The Department of Justice may urge successfully the plea that the United States can rescind the contract and repudiate the trust.

But it will be the duty of the United States, before she can rescind the contract, under the laws of California, to restore to Mexico the ceded territory.

Cal. Civil Code, sec. 1691.

When the United States has stricken from her flag the brightest star that illumines its western border, and has returned it untarnished to Mexico, the Department of Justice may invoke the power of this Court to affirm the judgment of the District Court on this motion.

The fears expressed by the learned Judge of the District Court that "If the present motion could be sustained, and a new order made in disregard of the final decree (?) of this Court, it would open up a new field of inquiry, and create future litigation that would be endless,"

Record, page 51, fol. 95.

seem to us to be ill-founded. As the holders of the title derived from Luis Peralta are protected by the decree of 1859, the making of a patent for their lands, *however long delayed,* could not unsettle their title; it would settle it, and give to it the conclusive character intended by the treaty and by the act of 1851. No one deriving title under Luis Peralta could be ousted from his holdings, under a patent founded on the grant to him, as the patent would be an affirmance of the title so derived.

Morrow vs. Whitney, 95 U. S. 554.
Tripp vs. Spring, supra.

It appears to us, that the most effectual way of putting a stop to litigation about the title to private land claims in California is for the Courts to do their duty in perfecting in the owners the evidences of their title, provided in the treaty and the act.

No duty was imposed upon the claimants by the act, except presentation and prosecution of their claims, and when found valid to demand patent. If the United States was defeated, she was to be the actor in the execution of the decree. She was to issue the patent when it might be requested by the confirmee.

There is nothing ambiguous in the language used by Congress; there is no room for construction; it is the word of command *"and for all claims finally confirmed * * * a patent shall issue to the claimant."*

Sec. 13, act of 1851.

Legislative acts are not to be construed to subvert property rights.

Rutherford vs. Green, 2 Wheat. 203.
Supervisors vs. U. S., 4 Wall. 435, 446.

A patent "conformably to the decree" is the right of the confirmee. Until such patent is made, the contest between the United States and claimant is still *sub judice.*

If the survey of 1895 is a survey, the only survey of the claim confirmed, a patent under it, and only such patent, "would be a patent conformably to the decree," and the District Court has jurisdiction until such patent is made.

It devolves upon the United States to establish that such a patent has been made, and if it cannot do so, to make it.

The duty and right will then devolve upon the confirmees to accept or question such patent.

The United States is a political entity. A trinity composed of three departments: Legislative, Judicial, and Executive.

Her will is expressed through her legislative department, whose laws within the limits of the constitution must be interpreted and sustained by the judicial department, and enforced by the executive.

The will of the legislature in respect of claims of title to land originating under the former Government of California is expressed in the act of 1851.

If the claim was decreed to be valid by the board or the Courts, the decree was to be conclusive on the United States, conclusive upon the trinity, and each member of it.

The Judiciary which pronounced the decree under legislative authority must obey and enforce it, through the Executive Department; which must perform the ministerial duty imposed on it.

Martin vs. Hunter, 1 Wheat. 304.

Is this the hospitality which the decree in this case has met from the United States? Her District Court has refused to recognize or enforce it. Her Executive has refused to issue a patent upon it.

"Of what value is that title which communicates no right or interest in the land itself? Or, how can that be said to be any title at all which cannot be asserted in a court of justice by the owner to defend or obtain possession of his property"?

Green vs. Biddle, 8 Wheat. (5 Cond. Rep. 373).
Law Notes, vol. IV, No. 6, page 111.

What has become of the title with which Spain invested Luis Peralta in the year 1820; which was his when the treaty with Mexico was promulgated in 1848; his when California was admitted into the Union; his at the time of his death; his to dispose of by will; his to create *the claim of title* under the laws of California, in the devisees, which this Court has decreed to be valid?

U. S. vs. Crosby, 7 Cranch, 115.

What has become of the decree of this Court by which these rights were established? What provision of the constitution sanctions its overthrow by the land department?

Irvine vs. Marshall, 20 How. 558, 567, 569.

The constitution, the laws of the United States made in pursuance thereof, and the treaties with Mexico, must be read together, for it is together that they constitute the supreme law of the land; together they recognize the property rights of appellants, and together they control and limit the action of this Court.

2 Story on the Constitution, sec. 1838.

Repudiated by the author of its being, the decree of 1859 comes in confident reliance upon the justice of its claim, to its foster parent for recognition and execution.

The *italics* made use of in this brief are the conception of counsel, and do not occur in the originals quoted from.

Counsel for appellants suggest to the Court the death, on

June 26, 1901, of appellant, Mary E. H. Gwin. Interest in the relief sought on the motion in the Court below and on the appeal to this Court has survived to her co-appellant, Miers F. Truett.

We respectfully ask that the order of the Court below be reversed, and that the District Court be directed to enter an order in pursuance of the mandate of this Court ordered at December Term, 1856, for the execution by the United States, its officers, agents, attorneys, and servants, of its decree of confirmation of November 30, 1859, by the issuance of a patent conformably thereto, for the whole of the confirned claim.

BOYD & FIFIELD,
JAMES T. BOYD,
GEORGE A. KING,
THAYER & RANKIN,
Of Counsel for Appellants.

Exhibit "C."

PATENT.

THE UNITED STATES OF AMERICA,
To
DOMINGO and VICENTE PERALTA.

Feby. 10th, 1877.

The United States of America, to All to Whom These Presents Shall Come, Greeting:

Whereas, it appears from a duly authenticated transcript filed in the general land office of the United States, that pursuant to the provisions of the act of Congress approved the third day of March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," Domingo and Vicente Peralta as claimants filed their petition on the 21st day of January, 1852, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition they claimed the confirmation of their title to a tract of land situate in the county of Contra Costa and state aforesaid, said claim being founded on a Spanish grant to Luis Peralta made on the 3d day of August, A. D. 1820, by Don Pablo Vicente de Sola, then Military Governor of New California.

And whereas, the board of Land Commissioners aforesaid on the 7th day of February, 1854, rendered a decree of confirmation in favor of said Domingo and Vicente Peralta, which decree or decision having been taken by appeal to the District Court of the United States for the Northern District of California, the said District Court in the cause entitled Domingo and Vicente Peralta vs. The United States, rendered its decree as follows, to wit:

"This cause coming on to be heard on this day upon the petition, and answer, the certified transcript of the proceedings and decision of the Board of Commissioners on private land claims in California and of the papers and evidence on which the same are founded, and upon the further evidence taken by the order of this Court and was argued by counsel—

"In consideration whereof, the Court doth adjudge, order, and decree that the claim presented in the petition filed in this case for the place called San Antonio is valid to the whole extent of its bounds, to wit: Having for its northern boundary a line commencing on the bay of San Francisco, at a point where there are close to the said bay the two cerritos, as described in the first possession given by Martinez to Luis Peralta on the 16th day of August, 1820, running from the said bay eastwardly along

by the southern base of the cerito of San Antonio, up a ravine, at the head of which there is a large rock or monument looking to the north, described in evidence as the Sugar Loaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the Sierra; thence for the western boundary a line running along the comb of the said Sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco at the mouth of the deep creek of San Leandro, and running eastwardly up the said creek to its head or source in the Sierra and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio, and by the said bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of the said tract, which line along the bay constitutes its western boundary.

"And it is hereby further adjudged, ordered, and decreed that there be confirmed to the said Domingo and Vicente Peralta the northern portion of said land of San Antonio bounded as follows.

"On the north by the northern boundary of said tract of San Antonio as above described, on the east by the comb of the said Sierra; on the west by the bay of San Francisco, and on the south by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, being the line of division between this land and the land of Antonio Peralta, which line extends from the said bay to the most eastern boundary of the rancho of San Antonio."

"And thereafter the mandate of the Supreme Court of the United States dismissing the appeal granted and taken in the above entitled cause having been presented and filed in the aforesaid District Court the said District Court, on the 19th day of January, 1858, ordered "that the said claimants, Vicente Peralta and Domingo Peralta, may proceed under the decree of this Court heretofore rendered in favor of said claimants as a final confirmation of the lands claimed in their petition."

And whereas, it further appears that this cause, upon the application of the United States Attorney, was again brought before the aforesaid District Court and the following proceedings had, to wit:

"Stated Term, Nov. 30th, 1859.

"It satisfactorily appearing to the Court that in the decree of this Court heretofore entered in this cause and affirmed on appeal by the Supreme Court of the United States a clerical

error has intervened, and that the said decree is repugnant and inconsistent with itself, and it further appearing to this Court that the northern boundary of the tract of land confirmed to said claimants is erroneously described as running by the *southern* base of the cerrito therein mentioned, whereas the said northern boundary as declared and adopted by the Supreme Court of the United States in the opinion of said Court in this case is the rivulet which issues from the mountain range, and runs along the foot of said cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument and looking towards the north, and it appearing to this Court that the rivulet so adopted as the said northern boundary runs along the northern base of the said cerritos of San Antonio and not along the southern base thereof, and it further appearing that the ridge of mountains constituting the eastern boundary of said rancho is erroneously denominated its western boundary, as is manifest from the face and terms of the decree itself.

"It is on motion of the counsel for the parties interested in said claim, and the District Attorney being present and not objecting thereto—

"Ordered, that the said decree be, and the same hereby is, construed and amended by substituting the word 'northern' for 'southern' where the word 'southern' first time occurs in said decree and the word 'eastern' for 'western' where the latter word first occurs in said decree.'

"And whereas, it further appears that pursuant to an order of the aforesaid District Court made March 5, 1860, directing the United States surveyor general for the State of California to return into said court a duly certified copy of the plat of the official survey made by him of the land finally confirmed in this case, and in accordance with the subsequent proceedings had in said District Court upon survey and location said District Court on the 4th day of August, 1871, rendered its final decree upon survey as follows, to wit:

"In the Matter of the Survey and Location of that Portion of the Rancho San Antonio, Confirmed in the Above-entitled Cause.

"This cause came on this day again to be heard and, it appearing to the Court that no exception has been filed to the modified survey heretofore made under the order of this Court, and a plat of which was filed in the clerk's office of this Court on the 26th day of July 1871. Now, therefore, on motion of Williams & Thornton, due notice thereof having been given, it

is ordered, adjudged, and decreed, and this Court doth hereby order, adjudge, and decree, that said modified survey be, and is hereby, approved as a true and correct transcript of the lands confirmed in the above-entitled cause.

"The survey of which confirmation is hereby made contains eighteen thousand eight hundred and forty-eight 98-100 (18,848 98-100) acres, and is the same executed under the order and directions of this Court by decree entered in this cause on the 5th day of June, 1871, a duly certified plat whereof was filed in the clerk's office of this Court as aforesaid on the 26th day of July, 1871, and is marked 'Approved August 4th, 1871. Ogden Hoffman, Dist. Judge,' and attached hereto as a part of this decree.

"And whereas, under the thirteenth section of said act of 3d March, A. D. 1851, and the supplemental legislation and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the general land office a return with the descriptive notes and plat of the survey of the said claim confirmed as aforesaid authenticated by the signature of the United States surveyor general for the State of California, which descriptive notes and plat of survey are in the words and figures as follows, to wit:

"U. S. Surveyor General's Office.
San Francisco, Cal. 27th May, 1876.

"Under and by virtue of the provisions of the 13th section of the act of Congress of the third of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' and of the 12th section of the act of Congress, approved on the 31st of August, 1852, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes; and whereas the U. S. District Court for the Northern District of California rendered a decision whereby it recognized and confirmed the title and claim of Domingo and Vicente Peralta to the tract of land designated as 'San Antonio,' as appears from the certified copy of the final decree of the said District Court a copy of which is hereto annexed. The said tract of land was surveyed in conformity to the grant thereof and the said decision, and I hereby certify that the accompanying map is a true and accurate plat of the said tract of land as approved by the U. S. District Court, having been examined and approved remain of record therein. The descriptive notes of said tract are in the words and figures following, to wit:

"Beginning at a post in a mound of earth on the marsh on the shore of the bay of San Francisco, opposite the Northern base of the cerrito of San Antonio, on the dividing line between the counties of Alameda and Contra Costa, which names together with 'Initial Point' are marked thereon, and from which the north point of Angel Island bears south seventy-five degrees forty-five minutes west and Victor Castro's house bears north eighty degrees thirty minutes east; thence," etc. (Inserting the field-notes of said survey as shown in the plat thereof).

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Exhibit "G."

PATENT.

THE UNITED STATES OF AMERICA,
To
ANTONIO PERALTA.

The United States of America, To All to Whom These Presents Shall Come, Greeting:

Whereas it appears from a duly authenticated transcript filed in the general land office of the United States that pursuant to the provisions of the act of Congress approved the 3d day of March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," Antonio Peralta, as claimant, filed his petition on the 18th day of June, 1852, with the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, on which petition he claimed the confirmation of his title to a tract of land containing about two leagues, situate in the then county of Contra Costa and State aforesaid, said claim being founded on a Spanish Grant to Luis Peralta made on the 3d day of August, A. D. 1820, by Don Pablo Vicente de Sola, then Military Governor of New California. And whereas the Board of Land Commissioners aforesaid on the 7th day of February, A. D. 1854, rendered a decree of confirmation in favor of Antonio Peralta as follows, to wit:

In this case on hearing the proofs and allegations it is adjudged by the commission that the claim of the said petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is situated in Alameda County, and is a portion of the land known by the name of San Antonio, and is bounded as follows, to wit: "On the south by a small dry creek known as the boundary between the lands of said Antonio Peralta and his brother, Ygnacio Peralta, being the northern boundary of the land this day confirmed by a decree of this commission to said Ygnacio Peralta, on the north by a ravine a short distance south of the buildings in the town of Oakland, on the north of which ravine there is a small house in sight of the public road, the northern line of this land being the line of division between it and the land of Vicente Peralta; on the west by the bay of San Francisco, and on the east by the mountain range extending nearly parallel to the said bay and being the nearest range thereto. The said premises hereby confirmed are the same, and so intended to be, which are assigned to said Antonio Peralta by a stipulation entered into by the attorneys of said Antonio Peralta and his brothers,

Ygnacio, Vicente, and Domingo Peralta, for an assignment of their respective portions of said place called San Antonio, a copy of which stipulation is hereunto attached and made a part of the decree, the said confirmed premises being subject, however, to the limits above specified.

ALPHEUS FELCH,
THOMPSON CAMPBELL,
R. AUG. THOMPSON,
Commissioners.

In the Matter of Peralta Claim.

It is agreed between the claimants that the southern part of the rancho is the land that was given to Ygnacio Peralta, and extends to a small dry creek bounding the land of Antonio Peralta; that going north, the second part is that of Antonio Peralta, which extends to the lands (of) Vicente Peralta, and a short distance south of the buildings in the town of Oakland, being a ravine on the north of which there is a small house in sight of the public road, the land of Vicente Peralta extends to the land of Domingo Peralta, who owns the northern portion of the rancho and to the most northern limits. These dividing lines extend from the bay to the most eastern boundary of rancho.

(Signed) JONES, THOMPKINS & STRODE,
For ANTONIO & YGNACIO PERALTA.
(Signed) "Irving & Rose."

Which decree or decision having been taken by appeal to the District Court of the United States for the Northern District of California, the following proceedings were had as follows, to wit, in the cause entitled, "The United States, Appellants, vs. Antonio Peralta, Deft."

"In this case, on motion of the defendant by his counsel, and with the consent of the United States District Attorney, it appearing to the satisfaction of the Court that the decree heretofore entered in the case, to wit, on the 4th day of December, 1855, was erroneous and not in conformity to the original decree of this Court entered on the 26th January, 1855, by which the claim to the entire rancho or tract of land known as San Antonio, of which the lands claimed in the present case form a part was declared to be valid and its boundaries distinctly defined and set forth.

It is therefore, adjudged, ordered, and decreed that the aforesaid decree of the 4th day of December, 1855, be, and the same is hereby, annulled and set aside, and that in lieu thereof the following decree be entered in said case nunc pro tunc:

"THE UNITED STATES, Appts.,

vs.

ANTONIO PERALTA, Appellee.

"This cause coming on for hearing at a stated term of said Court on appeal from a decision of the United States Land Commission appointed under an act of Congress approved March 3d, 1851, to ascertain and settle private land titles in the State of California, the same being heard on the record of the proceedings of said commission on petition and answer filed in this court was argued by counsel, and it appearing to the satisfaction of the Court that the land in this case claimed is part and parcel of a larger tract situated in the county of Alameda, and within the jurisdiction of the Court known as the rancho or lands of San Antonio, the title to which said last-mentioned tract of land was by a decree of this Court rendered at a special term thereof on the 26th day of January, 1855, in the case of Domingo and Vicente Peralta vs. The United States, being case No. (100) one hundred on the docket of the same, declared to be valid, and its boundaries ascertained and defined to be as follows, to wit: Having for its northern boundary a line commencing on the bay of San Francisco at a point where there are close to the said bay the two cerritos as described in the first possession given by T. Martinez to Luis Peralta on the 16th day of August, 1820, and running from said bay eastwardly along the southern base of the cerrito of San Antonio up a ravine, at the head of which there is a large rock or monument looking to the north, described in the evidence as the Sugar Loaf Rock; thence by the southern base of said rock to the comb or crest of the coast range of mountains or the Sierra; thence for the western (eastern) boundary a line running along the comb of the said Sierra until it reaches the eastern extremity of a line beginning on the said bay of San Francisco at the mouth of the deep creek of San Leandro, and running eastwardly up said creek to its head or source in the Sierra, and to the comb or crest thereof, which last line is the southern boundary of the land of San Antonio and by the bay of San Francisco from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of the said tract, which line along

the bay constitutes its western boundary, the northern portion of which said rancho or tract of land called San Antonio, was by the decree aforesaid confirmed to the claimants Domingo and Vicente Peralta, and it appearing further from the evidence in this case, as also by a stipulation between the attorneys of the said Antonio Peralta and his brothers, Ygnacio, Vicente and Domingo Peralta, contained in the records of the case, that the said Antonio Peralta is entitled to a certain portion of the said lands of San Antonio lying north of and adjoining the lands claimed by the said Ygnacio Peralta, the boundaries of which are described and set forth in said stipulation:

"It is hereby adjudged, ordered, and decreed that the claim of the said Antonio Peralta is valid, and that there be confirmed to him the lands described in said stipulation and bounded as follows: On the south by a small dry creek known as the boundary between the lands of the said Antonio Peralta and his brother Ygnacio Peralta; on the north by a ravine a short distance south of the buildings in the town of Oakland; on the north of which ravine there is a small house in sight of the public road, being the division line between the lands hereby confirmed, and the lands confirmed to Vicente and Domingo Peralta by said decree of the 26th of January, 1855, on the west by the bay of San Francisco and on the east by the comb or summit of the Sierra or mountain range nearest to the bay of San Francisco, and running nearly parallel therewith.

"OGDEN HOFFMAN,
"U. S. Dist. Judge.

"I consent to the entry of the foregoing order and decree.

"WM. BLANDING,
"Dist. Atty.

"[Endorsed]: Filed January 29th, 1857. For December 4th, 1855.

"JOHN A. MONROE,
"Clerk.
"By W. H. Chevers,
"Deputy."

And thereafter the Attorney General of the United States having given notice that appeal in the cause entitled "The United States vs. Antonio Peralta" would not be prosecuted by the United States, and a stipulation to that effect having been entered into by the United States District Attorney, the aforesaid District Court on the 20th day of October, A. D. 1857,

ordered, adjudged, and decreed that the order granting appeal in behalf of the United States in this case be vacated, and that claimant have leave to proceed under the decree of this Court heretofore rendered in his favor as under final decree whereby the proceedings of Court upon title became final. And whereas it further appears that this cause was brought before the aforesaid District Court in the matter of survey and location, whereupon the following proceedings were had on the 3d day of February, A. D. 1863, as follows, to wit: "The United States vs. Antonio Peralta, No. 98, Part of San Antonio."

This cause came on to be heard on objections to the official survey and location of the lands confirmed to Antonio Peralta, which survey was made by Jas. T. Stratton, U. S. Dep. Surveyor, and approved October 19, 1858, by J. W. Mandeville, United States surveyor general for California, and a certified copy plat filed herein, and the allegations and proofs having been seen, and counsel for the respective parties heard and due deliberation had in the premises—it is now ordered, adjudged, and decreed that all of said objections be, and the same hereby are, overruled and dismissed, and that the said official survey is a just and true location of the lands heretofore confirmed to the claimant herein, except as to the objections of the intervenors, H. W. Carpentier, H. N. Carpentier, and I. E. Smith, to the including within said survey of the tide lands lying within the corporate limits of the city of Oakland, which said objections are hereby sustained and approved, and so much of said official survey as lies within said corporate limits is hereby adjudged to be erroneous, and ordered to be corrected and modified. And it is further ordered that the United States surveyor general for California cause said survey and location to be corrected and reformed so as to conform to this decree and return the same to this Court for its final confirmation and approval. And it is further ordered and adjudged that in correcting and reforming said survey and location hereunder the said surveyor general shall follow and adopt the official survey already made without change or modification from the initial point thereof designated on said plat "Stake T P 1," through all the lines and courses thereof, respectively numbered on said plat from 1 to 53, both inclusive, and also respectively numbered from 68 to 97, both inclusive, and that between lines or courses 53 to 68 said official survey and location be so changed and modified as to run along the inner line of the shore excluding from said survey and from the lands confirmed the waters of the bay of San Francisco and of the arms

thereof and the lands covered thereby as far as the tides flow at the full and change of the moon. And it is further ordered that a copy of the order be served on the said surveyor general by the United States marshal.

And whereas, it further appears that the following proceedings were had in the said District Court on the 21st day of September, A. D. 1865, as follows, to wit: "The United States vs. Antonio Peralta et al., No. 98." This cause coming on this day again to be heard on motion to vacate the decree entered herein on the 3d day of February, 1863, and on the 2nd day of March, 1863, was argued by counsel, and thereupon and in consideration thereof it appearing to the Court that said decrees so entered as aforesaid do not conform to the decision of this Court and the directions given therefor in its written opinion.

It is ordered, adjudged, and decreed, and the Court doth hereby adjudge and decree, that said decrees be, and the same are hereby, vacated, and it is further ordered, adjudged, and decreed that the survey of that part of the Rancho San Antonio confirmed to the said Antonio Peralta, the field-notes of which were approved by E. F. Beale, United States surveyor general, on the 28th day of February, 1863, be modified so as to exclude therefrom only the lands which are covered by those tides which happen between the full and change of the moon twice in twenty-four hours, and that the said survey be in all other respects approved.

And it is further ordered that the surveyor general of the United States for the State of California cause said survey to be modified as herein directed so soon as practicable, and return into this court a plat of the same for its approval.

And whereas, under the thirteenth section of said act of 3d March, A. D. 1851, and the supplemental legislation and in accordance with the proceedings had pursuant to said act and supplemental legislation, there has been deposited in the general land office a return with the descriptive notes and plat of the survey of the said claim confirmed as aforesaid, authenticated by the signature of the United States surveyor general for the State of California, which descriptive notes and plat of survey are in the words and figures as follows, to wit:

U. S. Surveyor General's Office, San Francisco, Cal.

Under and by virtue of the provisions of the 13th section of the act of Congress of the 3rd of March, 1851, entitled "An act

to ascertain and settle the private land claims in the State of California, and of the 12th section of the act of Congress, approved on the 31st of August, 1852, entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes.

And whereas the U. S. District Court for the Northern District of California rendered a decision, whereby it recognized and confirmed the title and claim of Antonio Maria Peralta to the tract of land designated as San Antonio Rancho in Alameda County, California, as appears from the certified copy of the final decree of the said District Court, a copy of which is hereto annexed.

The said tract of land was surveyed in conformity to the grant thereof and the said decision, and I hereby certify that accompanying map is a true and accurate plat of the said tract of land as appears by the field-notes of the survey thereof, made by Jas. T. Stratton, deputy surveyor, under the direction of this office, which having been examined and approved, remain of record therein.

(Here follows field-notes of this survey).